129

(1)

Supreme Court, U.S.
FILED

081454 MAY 21 2009

OFFICE OF THE CLERK

No. 08-

In the Supreme Court of the United States

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,

Petitioner,

v.

MICHELLE MONTEAGUDO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

PEDRO E. ORTIZ-ALVAREZ
JORGE MARTINEZ-LUCIANO
LAW OFFICES OF PEDRO ORTIZ-ALVAREZ, PSC
P.O. BOX 9009
SAN JUAN, PR 00732

PAUL D. CLEMENT
Counsel of Record
JEFFREY S. BUCHOLTZ
SARAH O. JORGENSEN
KING & SPALDING LLP
1700 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20006
(202) 737-0500

Attorneys for Petitioner

May 21, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether an employer is vicariously liable under Title VII for sexual harassment where the employer has implemented a concededly adequate anti-harassment policy with complaint procedure pursuant to this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and the plaintiff fails to take advantage of the policy because of an unsupported subjective belief that it would be futile or lead to retaliation.

CORPORATE DISCLOSURE STATEMENT

Petitioner Asociacion de Empleados del Estado Libre Asociado de Puerto Rico is a private non-profit entity composed of and owned by public employees. There is no parent or publicly-held company owning 10% or more of petitioner's stock.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 11

I. The Circuits Are Divided On What Constitutes A Reasonable Justification For An Employee To Bypass A Valid Complaint Procedure 14

A. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis to Believe A Complaint Will Be Futile 14

B. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis To Believe A Complaint Will Lead To Retaliation 18

TABLE OF CONTENTS
(continued)

Page

C. In Conflict With The Decision Below, Other Circuits Do Not Excuse A Failure to Report Even When The Plaintiff Suffers Much More Severe Trauma 23

II. The First Circuit's Approach Vitiates The Affirmative Defense That This Court Created In *Ellerth* and *Faragher* 25

A. Reporting Should Be Presumptively Required, And Failure To Report Should Be Excused Only For Objectively Supported Reasons 26

B. It Is Particularly Important For Plaintiffs To Fulfill Their Duty To Report Where, As Here, The Employer Has Fulfilled Its Duty Of Instituting A Proper Policy 30

C. The First Circuit's Acceptance of Subjective, Unsupported Reasons For Failing To Report Vitiates The Affirmative Defense 31

III. This Court's Guidance is Needed, And This Case Is An Ideal Vehicle 34

CONCLUSION 37

TABLE OF CONTENTS
(continued)

Page

APPENDIX

Court of Appeals Opinion (Jan. 26, 2009) 1a

District Court Opinion (Aug. 2, 2007) 26a

Court of Appeals Order Denying Rehearing (Feb. 20, 2009) 33a

TABLE OF AUTHORITIES

Page

CASES

Adams v. O'Reilly Automotive, Inc.,
538 F.3d 926 (8th Cir. 2008) 12, 19, 27, 30

Albino Agosto v. Angel Martinez, Inc.,
2007 WL 1828398 (P.R. June 4, 2007) 8

Amati v. U.S. Steel Corp.,
304 Fed. Appx. 131 (3d Cir. 2008) 23

Anderson v. Wintco, Inc.,
__ Fed. Appx. __, 2009 WL 449169 (10th Cir. Feb. 24, 2009) 15

Baldwin v. Blue Cross/Blue Shield of Alabama,
480 F.3d 1287 (11th Cir.2007) 12, 27, 29, 32

Barrett v. Applied Radiant Energy Corp.,
240 F.3d 262 (4th Cir. 2001) .....passim

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) .....passim

Cardenas v. Massey,
269 F.3d 251 (3d Cir. 2001) 22, 23, 34

TABLE OF AUTHORITIES
(continued)

Page

Crawford v. Metropolitan Gov't of Nashville and Davidson County,
129 S. Ct. 846 (2009) .....passim

Deters v. Rock-Tenn Co.,
245 Fed. Appx. 516 (6th Cir. 2007)..... 15, 16

Distasio v. Perkin Elmer Corp.,
157 F.3d 55 (2d Cir. 1998) 20

Doe v. Oberweis Dairy,
456 F.3d 704 (7th Cir.2006) 24

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) .....passim

Hardage v. CBS Broadcasting, Inc.,
427 F.3d 1177 (9th Cir. 2005) 36

Harper v. City of Jackson Municipal School Dist.,
149 Fed. Appx. 295 (5th Cir. 2005)..... 23

Holly D. v. Cal. Instit. of Tech.,
339 F.3d 1158 (9th Cir. 2003) 14, 16

TABLE OF AUTHORITIES
(continued)

Page

Johnson v. District of Columbia,
552 F.3d 806 (D.C. Cir. 2008) 28

Kolstad v. American Dental Ass'n,
527 U.S. 526 (1999) 10

Leopold v. Baccarat, Inc.,
239 F.3d 243 (2d Cir. 2001) .....passim

Madray v. Publix Supermarkets, Inc.,
208 F.3d 1290 (11th Cir. 2000) 28, 36

McPherson v. City of Waukegan,
379 F.3d 430 (7th Cir. 2004) 31

Mota v. Univ. of Texas Houston Health Science Center,
261 F.3d 512 (5th Cir. 2001) 22, 23

Pinkerton v. Colorado Dept. of Trans.,
__ F.3d __, 2009 WL 1014589 (10th Cir. Apr. 16, 2009) 13, 19, 29

Reed v. MBNA Mktg. Sys.,
333 F.3d 27 (1st Cir. 2003) .....passim

TABLE OF AUTHORITIES
(continued)

Page

Shaw v. Autozone,
180 F.3d 806 (7th Cir. 1999) 19, 22, 32, 36

Terwilliger v. Greyhound Lines, Inc.,
882 F.2d 1033 (6th Cir. 1989) 29

Thornton v. Federal Express,
530 F.3d 451 (6th Cir. 2008) 19

Walton v. Johnson & Johnson Svcs., Inc.,
347 F.3d 1272 (11th Cir. 2003) 13, 19, 24

Weger v. City of Ladue,
500 F.3d 710 (8th Cir. 2007) 14, 16, 19, 21

Williams v. Administrative Review Board,
376 F.3d 471 (5th Cir. 2004) 34

Wyatt v. Hunt Plywood Co.,
297 F.3d 405 (5th Cir. 2002) 18

STATUTES AND RULES

28 U.S.C. 1254(1) 1

28 U.S.C. 1331 7

TABLE OF AUTHORITIES
(continued)

Page

28 U.S.C. 1367(a) 7

42 U.S.C. 2000e-2(a)(1) 1

Fed. R. Civ. P. 50(a) 8

The Asociacion de Empleados del Estado Libre Asociado de Puerto Rico respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 554 F.3d 164 and is reproduced in the Appendix herein at 1a-25a. The decision of the U.S. District Court for the District of Puerto Rico is not officially reported but is available at 2007 WL 2245944 and is reproduced in the Appendix at 26a-32a.

JURISDICTION

The judgment of the court of appeals was issued on January 26, 2009. Pet. App. 1a. Petitioner's timely petition for rehearing and rehearing en banc was denied on February 20, 2009. Pet. App. 33a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(a)(1), provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer --

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

This case concerns the continuing vitality of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those decisions, this Court struck a balance between imposing vicarious liability under Title VII and providing incentives for employers to avoid that liability by creating adequate internal anti-harassment and complaint policies. The Court first held that an employer is vicariously liable under Title VII for a supervisor's sexual harassment creating a hostile work environment. Where no tangible employment action is taken, however, the Court made clear that the employer has an affirmative defense if it shows (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," such as by implementing an anti-harassment policy with complaint procedure; and (2) that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer," such as by unreasonably failing to use such a complaint procedure. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The decision

below interprets the second prong of that analysis to make the employee's use of a valid complaint procedure essentially voluntary, which has the effect of fundamentally reworking the balance the Court struck in *Ellerth* and *Faragher*.

In the present case, respondent alleged, and the jury found, that she was sexually harassed for several months by a supervisor who created a hostile work environment. Petitioner had instituted an anti-harassment policy and complaint procedure of which respondent was aware. The jury found that petitioner carried its burden under *Ellerth* and *Faragher* of exercising reasonable care to attempt to prevent and correct sexual harassment by adopting and disseminating this anti-harassment policy. Respondent nonetheless did not report the harassment to petitioner at any time during her employment; instead, she resigned and then brought this suit.

1. Respondent Michelle Monteagudo worked in 1999 and 2000 as a temporary employee at petitioner Asociacion de Empleados del Estado Libre Asociado de Puerto Rico ("AEELA"). In October 2000, she became a permanent secretary in the Human Resources Department. At that time, she was provided a copy of petitioner's sexual harassment policy, for which she signed a receipt. Court of Appeals Appendix ("A") 938-39. Respondent acknowledged that she had a copy of the policy and knew "what the procedures that needed to be followed were." A-974. Petitioner's policy stated:

> An employee who feels he has been sexually harassed at work in any way, should present his complaint to the

> Human Resources Department. If the alleged harasser should be this person, or anyone related or close to him, then the complaint must be presented directly to the Association's Executive Director.

A-156.

Respondent's immediate supervisor in the Human Resources Department was Orlando Vargas, the Director of Human Resources. Juan Francisco Arce-Diaz ("Arce"), a payroll, fringe benefits, and compensation manager for whom respondent had worked as a temporary employee, also assigned her work. Respondent testified that Arce began harassing her in mid-2002. Arce would "stop by" her work station at least once a day and "touch [her] on the shoulder," and she would "throw his hand backwards so he'd leave [her] alone." A-962-63. He also invited her "constantly to go out together" with other co-workers. A-961. In November 2002, after several months of this behavior, respondent testified that Arce "pulled [her] towards him to try to kiss [her]" in the parking lot of a local bar and she pushed him away. A-956-57.[1] The next work day, "the attitude displayed towards [respondent] by Mr. Vargas and Mr. Arce" was "changed completely around." A-963-64. Respondent testified that she was given additional work and that when she complained to Vargas about the work, "he slammed the desk very hard and told me that if I filed a

---

[1] Respondent testified that Vargas and a co-worker named Marilyn Del Valle Cruz witnessed the incident in the parking lot. They both testified that they never witnessed any inappropriate conduct. A-1034, 910.

complaint, the next day I would be dismissed." A-967. Respondent did not mention the alleged harassment in the parking lot (or any other harassment) in this complaint to Vargas.

The only witness besides respondent to testify to an incident of possible harassment was a fellow employee named Jose Francisco Figueroa-Cana ("Figueroa"). Figueroa testified that one time he saw Arce "place[] his hand on her . . . waist . . . [in] an undesirable action." Court of Appeals Supplemental Appendix ("SA") 10. Respondent told him "that was something that normally took place . . . that [Arce] would always try to seek a way so he could touch her." SA-12.

Figueroa also advised respondent on the procedures that she could follow to report Arce's alleged harassment. SA-15. Figueroa testified that "[he] told her to go through the channels as to the policies that AEELA refers to." SA-15. He later testified, however, that "[he] would tell her that [he] didn't know what [he] could recommend to her because of the type of person we were dealing with." SA-18. And he said the matter was "extremely difficult and quite delicate" because it involved Vargas and Arce. SA-19. Figueroa was a union delegate, but he did not alert the union to respondent's allegations of harassment for a variety of reasons: he did not represent her department, "for me it was extremely difficult to bring forth something like this dealing with who we dealt with," the union was "very weak," and the union president would not be helpful. SA-19-22. Notwithstanding Figueroa's equivocal advice to respondent, he testified that he had filed his own complaint with

Vargas relating to sexual harassment, and that petitioner had responded promptly and effectively. SA-23-28.

2. It is undisputed that respondent never told anyone in petitioner's management that she was sexually harassed. Petitioner's policy offered two options to report the alleged harassment: the Human Resources Department or petitioner's Executive Director (Pablo Crespo-Claudio ("Crespo")). Respondent testified that she did not report Arce's harassment to Vargas, the director of Human Resources, because Vargas and Arce were friends and had been out together at the bar where Arce allegedly tried to kiss respondent in the parking lot.[2]

With respect to Executive Director Crespo, respondent conceded that she had no reason to doubt his integrity. A-978. And respondent conceded that she had no knowledge of any past failure by Crespo to respond adequately to a harassment complaint. Indeed, respondent did not suggest that she had any reason to believe that, whether the complaint was made to the Human Resources Department or directly to the Executive Director, petitioner ever had failed to respond adequately to a harassment complaint.

Nonetheless, respondent testified that she did not report the harassment to Crespo because she believed the managers were all friends and would stick together rather than help a junior employee like her:

---

[2] Nor did respondent report the alleged harassment to Vargas's supervisor, Blanca Medina de Grau, even though respondent "had no problems with her," A-1000, and Medina was not a friend of Arce's.

> Because the person I needed to complain with were all friends. Either it be the executive director or the human resources director, they're all friends amongst themselves. We're talking about some managerials versus an employee who virtually had started working a few days before.

A-976; *cf.* A-1003 (respondent's counsel stating that respondent's "sole reason" for believing Medina would protect Vargas and Arce was that all three "were managerials").

3. A week or two after the alleged incident in the parking lot, on December 5, 2002, respondent submitted a letter of resignation to Executive Director Crespo. Respondent's resignation letter did not report the alleged harassment. Far from it: the letter stated that respondent was "very grateful for the opportunity that you gave me to work for [petitioner], getting to know and fraternizing with other colleagues and of belonging to such an excellent team." A-154. At trial, respondent claimed that a friend drafted the letter. She testified that the letter was false but that she signed it because "if I were to need something from the Association later, I wanted the doors to be open." A-988.

4. A year after resigning, on December 23, 2003, respondent filed suit against petitioner in the U.S. District Court for the District of Puerto Rico, alleging sexual harassment under Title VII and the laws of Puerto Rico. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. 1331 and 1367(a). At the end of respondent's case, and again at the close of all the evidence, petitioner moved for

judgment as a matter of law under Fed. R. Civ. P. 50(a) on the ground that it had established the *Ellerth-Faragher* affirmative defense. The district court denied the motions and submitted the affirmative defense to the jury.

The jury found that respondent was subjected to sexual harassment in violation of Title VII and Puerto Rico's analogous laws. The jury found for petitioner on the first prong of the *Ellerth-Faragher* defense, but for respondent on the second prong. A-601. The jury awarded compensatory damages of $333,000 and punitive damages of $300,000. The court then apportioned $1 of the compensatory damages to the Title VII claim and $332,999 to the claim under Puerto Rico law, because the latter provides for doubling compensatory damages. The resulting award was $965,999 not including interest. A-621. Petitioner renewed its motion for judgment as a matter of law as to the second prong of *Ellerth* and *Faragher*, but the district court denied the motion. Pet. App. 26a-32a.[3]

5. The First Circuit affirmed. Since the "parties agree[d] that the sexual harassment policy AEELA had in place was sufficient for it to meet the first prong of the defense," the only issue was whether respondent's "reasons for failing to report Arce's conduct to her superiors was [*sic*] unreasonable." Pet. App. 12a-13a. The court stated that under circuit precedent, "'[t]here is no bright-line rule as to when a failure to file a complaint

---

[3] The Puerto Rico Supreme Court subsequently imported the *Ellerth-Faragher* framework into local law. *See Albino Agosto v. Angel Martinez, Inc.*, 2007 WL 1828398, *8 & n.4 (P.R. June 4, 2007).

becomes unreasonable.'" Pet. App. at 12a (quoting *Reed v. MBNA*, 333 F.3d 27, 35 (1st Cir. 2003)). The court concluded that respondent was "understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas's relationship with Arce." Pet. App. 13a.

The court below found "more difficult" the question whether respondent's failure to report Arce to Crespo on the basis of their alleged friendship was unreasonable. Pet. App. 13a. The court of appeals noted that the "only evidence that [respondent] proffers for this friendship are conversations she overheard by Vargas and Arce and the fact that Crespo testified that he may have gone out with Arce for drinks." Pet. App. 13a. Nonetheless, the court cited other factors that it believed the jury could have taken into account, including Figueroa's advice to respondent that "the matter was 'extremely difficult and quite delicate' given the people involved," and the fact that "witnesses to the alleged harassment failed to report the sexual harassment as well." Pet. App. 13a. Although respondent had not testified that her age had anything to do with her decision not to make a complaint, the court below stated that respondent's "relative youth compared to Arce" also supported the reasonableness of her failure to report. Pet. App. 13a.

Moreover, although there was no evidence that petitioner ever had responded improperly or ineffectively to a harassment complaint, the First Circuit held that that did not matter. "Unlike other circuits," it explained, "we have not required . . . evidence demonstrating 'that the employer has ignored or resisted similar complaints or has taken

adverse action against employees in response to such complaints.'" Pet. App. 18a (quoting *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001)).[4] Nor did the court below point to any other objective basis to believe that a complaint would have been futile or provoked retaliation. Instead, the court simply invoked its prior caselaw stating that "juries are supposed to be good at detecting false claims and at evaluating reasonable behavior in human situations," Pet. App. 13a, and concluded that "[w]hile Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could conclude that her failure to report was based on 'more than ordinary fear or embarrassment' and was therefore reasonable." Pet. App. 14a.[5]

---

[4] The court below noted this disagreement with other circuits in rejecting petitioner's challenge to the exclusion of evidence that petitioner had successfully taken corrective measures in cases where its anti-harassment policy had been used. Pet. App. 18a. The First Circuit not only held that respondent need not point to past instances where petitioner's policy had failed, but also found it irrelevant that petitioner's policy in fact had succeeded in other cases. The court's holding that it could be reasonable for respondent to forgo reporting without regard to the actual efficacy of petitioner's policy underscores the court's acceptance of purely subjective and unsupported reasons for not reporting.

[5] The finding that petitioner fulfilled its duty under the first prong of *Ellerth-Faragher* to act reasonably to prevent and correct harassment cannot be reconciled with the finding necessary to permit punitive damages, *i.e.*, that petitioner acted "with malicious or reckless indifference" to respondent's rights and did not make "good-faith efforts to comply with Title VII." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545-46 (1999). The court below held that petitioner had waived any challenge to the punitive damages and declined to set aside the award on plain-error review. Pet. App. 21a-25a.

6. On February 20, 2009, the First Circuit denied petitioner's petition for rehearing or rehearing *en banc*. Pet. App.33a.

REASONS FOR GRANTING THE WRIT

The decision below effectively eviscerates the careful balance this Court struck in *Ellerth* and *Faragher* and creates a clear circuit conflict on whether generalized fears of retaliation or futility without any objective support excuse a would-be plaintiff from the duty to report sexual harassment pursuant to an employer's adequate anti-harassment policy. Several courts of appeals have held, using various formulations that all conflict with the decision below, that a plaintiff must have concrete, objective reasons for not reporting.

The Second Circuit requires proof that "the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2001). While acknowledging that holding, the First Circuit expressly rejected it (going so far as to uphold the exclusion of evidence of past responsiveness). Pet. App. 18a. There is clearly no such objective evidence in this case.

The Fourth Circuit has held that an employee cannot assume that a complaint will be futile "merely because members of the management team happen to be friends." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001). The court below, in contrast, held that respondent could forgo reporting because the person to whom the report should have been made (Executive Director

Crespo) may have socialized on occasion with the harasser along with other employees. *See* Pet. App. 13a.

The Eighth Circuit has held that fear of retaliation is not "generally a proper excuse for failing to report," because "[n]ormally bringing a retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation." *Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 933 (8th Cir. 2008). The court below, in contrast, in the absence of any objective basis to believe that retaliation was likely, accepted respondent's generalized, subjective fear of retaliation as a justification for failing to report.

The Eleventh Circuit has held that reporting is required except "in extreme cases." *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1306 (11th Cir. 2007). The court below, in contrast, held that reporting was not required in what is at most a typical case, with no facts that remotely can be termed "extreme."

In all these respects, the decision below conflicts with decisions of other circuits. Moreover, although the Third and Fifth Circuits have not addressed the issue as explicitly as the First Circuit, those courts appear to be aligned with the court below in adopting a decidedly more permissive attitude in allowing employees who bypass valid complaint procedures to prevail despite this Court's holding in *Ellerth* and *Faragher*.

The net effect of the decision below is to eviscerate the careful balance that this Court struck in *Ellerth* and *Faragher*. The availability of an affirmative defense was critical to the Court's

recognition of vicarious liability and to providing employers with the proper incentives to establish anti-harassment and complaint procedures. But those incentives will be diminished if the affirmative defense can be vitiated based on the thin showing accepted by the court below. Enforcement of the affirmative defense is important not merely to employer-defendants, but more fundamentally to the Court's carefully-crafted scheme to further Title VII's goal "to promote conciliation rather than litigation." *Ellerth*, 524 U.S. at 764. It is "at odds with the statutory policy" to impose vicarious liability on employers without giving employers "credit" for making "reasonable efforts to discharge their duty" by implementing anti-harassment policies. *Faragher*, 524 U.S. at 806.

When this Court imposed the reasonable-reporting duty, the Court understood that "the victim may well be reluctant to accept the risks of blowing the whistle on a superior." *Id.* at 803. But because "the cooperation of the victims" is necessary to expose and eliminate sexual harassment, *Walton v. Johnson & Johnson Svcs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003), and because it would be contrary to Congress' intent to impose automatic vicarious liability on employers, the Court required plaintiffs to act reasonably to report harassment despite the obvious reasons why many will be reluctant to do so. Most courts of appeals have recognized that excusing a failure to report based on nothing more than "subjective, ungrounded fears" would "completely undermine" the *Ellerth-Faragher* framework, *Pinkerton v. Colorado Dept. of Trans.*, __ F.3d __, 2009 WL 1014589, *8 (10th Cir. Apr. 16,

2009), and accordingly have insisted on concrete, objective reasons before a failure to report is excused. This Court should review and correct the First Circuit's contrary holding to restore uniformity and to vindicate the careful balance that the Court struck in *Ellerth* and *Faragher*.

I. The Circuits Are Divided On What Constitutes A Reasonable Justification For An Employee To Bypass A Valid Complaint Procedure

A. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis to Believe A Complaint Will Be Futile

1. Although their formulations of this rule have varied, a majority of the circuits require that there be concrete evidence of futility, beyond the victim's mere unsupported belief, to excuse a failure to follow the employer's complaint procedure. As the decision below acknowledges, the Second Circuit requires a showing that reporting has proved futile (or worse) in the past. Pet. App. 18a; *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (plaintiff must demonstrate "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints").

The Eighth and Ninth Circuits similarly have rejected efforts to bypass valid procedures absent actual evidence of futility. *See Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (unsupported belief in futility insufficient to excuse failure to report); *Holly D. v. Cal. Instit. of Tech.*, 339

F.3d 1158, 1179 n.24 (9th Cir. 2003) (same). The Sixth and Tenth Circuits have reached similar holdings in unpublished opinions. *See Anderson v. Wintco, Inc.*, __ Fed. Appx. __, 2009 WL 449169, *4 (10th Cir. Feb. 24, 2009); *Deters v. Rock-Tenn Co.*, 245 Fed. Appx. 516, 525-26 (6th Cir. 2007).

In short, the majority rule, as articulated by the Fourth Circuit, is that "[a]n employee's subjective belief in the futility of reporting a harasser's behavior is not a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer." *Barrett*, 240 F.3d at 268. The decision below, in contrast, expressly holds that objective evidence of actual futility is not required (and it is clear that no such objective evidence exists in this case). By approving respondent's unsupported subjective belief in futility as a valid reason to forgo reporting, the First Circuit has departed sharply from the majority of the courts of appeals.

2. More specifically, other courts have held that alleged friendship between managers is not a sufficient basis to assume that reporting will be futile. If it were, the *Ellerth-Faragher* framework would essentially be unavailable whenever a supervisor contributed to the alleged harassment. In *Barrett*, the Fourth Circuit explained that excusing reporting because of management friendships would vitiate the affirmative defense:

> We cannot accept the argument that reporting sexual harassment is rendered futile merely because members of the management team happen to be friends. Crediting this

> view would impose an impermissible burden on any company, especially small businesses. . . . [Plaintiff] claims that these friendships should relieve an employee of her reporting obligation and effectively impose automatic liability on the employer. Automatic liability, however, is precisely what the Supreme Court sought to avoid in fashioning the *Faragher/Ellerth* affirmative defense.

240 F.3d at 268. The Sixth and Eighth Circuits likewise have held that friendship between managers is common and does not, as a matter of law, excuse a failure to report. *See Deters*, 245 Fed. Appx. at 525 (that managers are friends is insufficient reason not to complain); *Weger*, 500 F.3d at 724-25 (plaintiffs' belief that they would not receive fair investigation because of "close relationship" between harasser and investigator is "insufficient"); *see also Holly D.*, 339 F.3d at 1179 n.24 (allegation of "faculty bias" does not "support a reasonable belief that Caltech was so biased that resort to its procedures would have been futile").

This case does not involve any allegation of a close, personal relationship, but only a degree of "friendship" that is to be expected of management in all but the largest enterprises. While the court below relied primarily on respondent's testimony that Crespo and Arce were friends, Pet. App. 13a, there was no evidence that Crespo and Arce were close friends, or relatives, or otherwise had such a close personal relationship that respondent could presume that Crespo would protect Arce in violation

of petitioner's written policy (and of the law). To the contrary, the evidence of Crespo's "friendship" with Arce consisted solely of the assertion that Crespo may have gone out for drinks on occasion with Arce, as Crespo also did with others in the office. *See* A-800 ("Have you ever gone out for drinks with Mr. Arce? [Crespo:] Maybe so. I don't specifically recall that I have, but I might have done so."). This shows -- at most -- a run-of the-mill collegial relationship, and is patently insufficient to excuse a failure to report under the law of most circuits.

The court also suggested that Figueroa's advice that the matter was "extremely difficult and quite delicate" bolsters respondent's assumption of futility. Pet. App. 14a. But again, this conflicts with the law of other circuits. Vague notions that managers stick together and of friendship among managers do not become transformed into objective evidence of futility by being described by a co-worker. What Figueroa pointedly did *not* say was that he knew of any complaints that had been futile or had resulted in retaliation. And he did not tell respondent that making a report would be futile or advise her not to make a report. To the contrary, he first testified that he told her to follow petitioner's procedures, and then equivocated that he did not know what to recommend. *See* SA-15, 18. Even if a co-worker's advice could substitute for evidence of actual futility in some circumstances (for example, where a co-worker erroneously tells the plaintiff that past complaints have been futile and the plaintiff forgoes reporting because she reasonably and sincerely believes that erroneous advice), Figueroa's equivocal advice did not come close to justifying

respondent's assumption that reporting would be futile.[6]

B. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis To Believe A Complaint Will Lead To Retaliation

1. A majority of the circuits hold that a generalized, unsupported fear of retaliation does not, as a matter of law, excuse a failure to report sexual harassment. As with an excuse based on futility, an excuse based on fear of retaliation must be founded on objective evidence, not subjective fears or skepticism. As the Eleventh Circuit has explained,

---

[6] The court below also stated that the jury could consider "the fact that witnesses to the alleged harassment failed to report the sexual harassment as well." Pet. App. 14a. But the court did not explain how the alleged failure of Vargas and Del Valle to report the alleged parking lot incident bears upon respondent's reasonableness in failing to report to Executive Director Crespo, and it does not. First, whether other employees failed to report as required by petitioner's anti-harassment policy is beside the point, for the reasonable reporting duty imposed by this Court rests on the would-be plaintiff. Second, that Vargas (who allegedly was complicit in Arce's harassment) failed to report it cannot excuse respondent's failure to follow the other specific avenue provided by the policy -- *i.e.*, reporting the harassment to Crespo, who was not alleged to be in any way complicit in it and whose integrity respondent had no reason to question. *See supra* at 6; *see also Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413 (5th Cir. 2002) (where supervisor to whom employee initially reported later joined in harassment, employee's "reasonable (not to mention obvious) course of action would have been to report [original harasser's] and [supervisor's] conduct to one of those individuals with authority higher than [supervisor's]").

"subjective fears of reprisal may exist in every case, but those fears, standing alone, do not excuse an employee's failure to report a supervisor's harassment." *Walton*, 347 F.3d at 1291. Similarly, the Eighth Circuit has admonished that "[w]e do not believe that a fear of retaliation is generally a proper excuse for failing to report sexual harassment." *Adams*, 538 F.3d at 932; *see also Weger*, 500 F.3d at 725 (fear of retaliation must be "truly credible"). Other circuits likewise have emphasized that a certain degree of concern over the potential for retaliation is inherent in the employer complaint process that the Court sanctioned, so undifferentiated and unsupported subjective fears "do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Thornton v. Federal Express*, 530 F.3d 451, 457 (6th Cir. 2008) (internal quotation omitted); *accord Shaw v. Autozone*, 180 F.3d 806, 813 (7th Cir. 1999); *Pinkerton*, 2009 WL 1014589, *8.

The Fourth Circuit's decision in *Barrett* illustrates the majority rule requiring concrete, objective evidence that retaliation is likely before a failure to report is excused. The plaintiff there claimed that she feared retaliation because the company president and the harasser were "good friends." 240 F.3d at 267-68. But because there was no evidence that the company had "ever taken any adverse tangible employment action against complaining employees," the court held that the plaintiff's fear was merely "[a] generalized fear of retaliation" that could not excuse her failure to report. *Id.*

Similarly, in the decision that the court below expressly rejected, the Second Circuit held that evidence of actual retaliation against prior complainants was required:

> A credible fear [of retaliation] must be based on more than the employee's subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints.

Leopold, 239 F.3d at 246.[7]

2. a. In conflict with these decisions, the First Circuit expressly acknowledged that it does not require concrete evidence to support an alleged fear of retaliation (or belief in futility):

> Unlike other circuits, we have not required that in order to overcome the second prong of the *Faragher-Ellerth* affirmative defense, plaintiffs must produce evidence demonstrating "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." *See, e.g., Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001).

---

[7] *Cf. Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 59, 64-65 (2d Cir. 1998) (failure to report later harassment excused where plaintiff initially reported co-worker's harassment to supervisor and supervisor told her she was "crazy" and would lose her job if she complained).

Pet. App. 18a. Indeed, the First Circuit not only explicitly rejected the Second Circuit's holding in *Leopold*, but went so far as to uphold the exclusion of evidence concerning an instance in which the internal complaint procedures had proven successful. Pet. App. 18a. Accordingly, while in the Second Circuit evidence of past futility or retaliation is required, in the First Circuit evidence of success is not even relevant.

In approving a failure to report based on unsupported, subjective fear of retaliation, the decision below built on the foundation that the First Circuit had laid in *Reed v. MBNA Mrkg. Sys., Inc.*, 333 F.3d 27 (2003). *Reed* noted that other courts had "focused on whether the employee had concrete reason to apprehend that complaint would be useless or result in affirmative harm to the complainant." *Id.* at 35-36. But *Reed* did not adopt this standard. Instead of giving legal content to this Court's "reasonableness" requirement, *Reed* stated that "juries are supposed to be good at . . . evaluating reasonable behavior in human situations," and reversed summary judgment for the employer. *Id.* at 37. Indeed, *Reed* acknowledged that its holding "creates a loophole for false and overstated claims of threat by one hoping to reach a sympathetic jury." *Id.*[8]

---

[8] Before the decision below, some courts had quoted other language in *Reed* in support of a standard similar to the majority rule requiring concrete, objective evidence. *See, e.g.*, *Weger*, 500 F.3d at 725. *Reed* suggested, for example, that "unless patently futile, concerns as to whether the complaint mechanism will fail can be tested by trying it out . . ." 333 F.3d at 36. Despite this language, *Reed*'s reversal of summary judgment for the employer meant that the plaintiff was *not*

b. The Third and Fifth Circuits appear to align with the First Circuit in declining to require objective evidence that a report of harassment would lead to retaliation. While these circuits have not addressed the issue as explicitly as the First Circuit, any requirement of an objective basis for a failure to report is conspicuous by its absence from their decisions, despite the substantial body of caselaw from other circuits adopting such a rule.

In *Cardenas v. Massey*, 269 F.3d 251, 267 (3d Cir. 2001), the Third Circuit held that whether an employee acted reasonably was a question for the jury where the employee waited four years to file a formal complaint "for fear of aggravating the situation or branding himself a troublemaker." There is no indication that the employer had retaliated against any prior complainants or of any other objective basis for the employee's fear that making a report would lead to adverse consequences. And rather than follow the Fourth and Seventh Circuits' decisions in *Barrett*, 240 F.3d at 267-68, and *Shaw*, 180 F.3d at 813, respectively, by requiring objective evidence, the Third Circuit focused on the employee's subjective belief.[9]

Similarly, in *Mota v. Univ. of Texas Houston Health Science Center*, 261 F.3d 512, 526 (5th Cir.

---

required to test out the complaint mechanism or to present any objective support for her belief in futility or retaliation. *Id.* at 37. In any event, the decision below has resolved any ambiguity in *Reed*, and it now is plain that the First Circuit does not require the concrete, objective evidence required by most circuits.

[9] *Cardenas* involved national-origin harassment, but the court expressly adopted the *Faragher/Ellerth* framework in that analogous context. *See* 269 F.3d at 261 n.6.

2001), the Fifth Circuit held that a nine-month delay in reporting harassment was reasonable where the supervisor threatened retaliation and the plaintiff "may have believed [the complaint process] was "ineffectual, given [the supervisor's] influence at the University." As in *Cardenas*, there is no indication in *Mota* that the employee's fear of retaliation was objectively supported, and the court focused instead on the employee's subjective belief.[10]

C. In Conflict With The Decision Below, Other Circuits Do Not Excuse A Failure to Report Even When The Plaintiff Suffers Much More Severe Trauma

The decision below also creates a circuit split on the question whether a failure to report sexual harassment can be excused because the plaintiff is young or has been traumatized by the harassment.

The decision below holds that respondent's failure to report was reasonable in part because respondent may have been more traumatized by it given the "significant age differential" between respondent and Arce. Pet. App. 14a. In *Reed*, the First Circuit had held that trauma could be a

---

[10] Some unpublished decisions arguably vary in their application of *Cardenas* and *Mota*, but as unpublished decisions they do not purport to change the law of the circuit. *See, e.g., Amati v. U.S. Steel Corp.*, 304 Fed. Appx. 131, 134 (3d Cir. 2008) (four-month delay in reporting unreasonable); *Harper v. City of Jackson Municipal School Dist.*, 149 Fed. Appx. 295, 302 (5th Cir. 2005) ("reasons for not complaining about harassment should be substantial and based upon objective evidence") (quotation omitted).

reasonable justification for failing to report where the plaintiff was a minor and had been sexually assaulted. *See* 333 F.3d at 37. By extending *Reed* to hold that respondent's "relative youth compared to Arce bears at least some relevance" even though respondent was not a minor (she was 22 and Arce 45) and did not suffer the kind of trauma associated with sexual assault, the decision below demonstrates the extent of the conflict among the circuits. Pet. App. 14a.

As to trauma, in contrast to the decision below, the Eleventh Circuit has rejected trauma as an excuse for failing to make a timely report despite the plaintiff's allegations that she was raped repeatedly and intimidated by being shown a gun. *See Walton*, 347 F.3d at 1290-91 & n.17. The court acknowledged that "severe harassment such as that which is alleged to have occurred here can be particularly traumatic," but it held that such trauma was insufficient as a matter of law to excuse the plaintiff's three-month delay in reporting. *Id.* at 1290. Without embracing this decision as correct, it does underscore the chasm between the approaches of the Eleventh and First Circuits.

As to age, there is similar tension between the decision below and a decision of the Seventh Circuit on the relevance of the plaintiff's "relative youth." In *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006), the Seventh Circuit held that, in assessing whether sexual conduct constituted unwelcome harassment, courts should look to whether the plaintiff was below the local age of consent. That bright-line approach to the relevance of age makes sense. But the decision below -- by injecting age as a

mitigating factor in the case of someone well above the age of consent -- distracts attention from objective evidence that could justify a failure to use valid and available complaint mechanisms.[11]

II. The First Circuit's Approach Vitiates The Affirmative Defense That This Court Created In *Ellerth* and *Faragher*

As most circuits have recognized, subjective fears of retaliation or futility concerning the employer's internal complaint procedure can exist in every case. After all, in every case it is the employer that is allegedly responsible, at least at some remove, for the harassment, and the employer is certainly in a position to retaliate in that it will be overseeing the complaint procedure. If such fears, without more, rendered it "reasonable" not to report harassment, the affirmative defense that this Court created would be essentially useless -- not only in protecting employers from the automatic liability that this Court held improper, but more fundamentally in achieving the Court's goal of furthering Title VII's "primary objective" of "avoid[ing] harm." *Faragher*, 524 U.S. at 806. To be sure, the Court's "reasonableness" standard does not invariably require every victim to report harassment no matter what the circumstances. But by holding

---

[11] Respondent did not testify that she failed to report because of youthful naivete or any alleged trauma. Any such suggestion would be contrary to respondent's testimony that she omitted any reference to the alleged harassment in her resignation letter because she wanted to keep her options open with petitioner. *See supra* at 7.

that a failure to report can be excused based on nothing more than the subjective, unsupported reasons offered by respondent, the First Circuit has vitiated the affirmative defense and the careful balance struck by this Court in *Ellerth* and *Faragher*.

A. Reporting Should Be Presumptively Required, And Failure To Report Should Be Excused Only For Objectively Supported Reasons

This Court fashioned the affirmative defense in order to avoid imposing automatic liability on employers -- which it held that Title VII could not support -- and because the affirmative defense would further Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employees." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764. The Court also noted, that in crafting this scheme, it intended to provide an "incentive" or "credit" to employers who make reasonable efforts to discharge their duty. *Faragher*, 524 U.S. at 806. "To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purposes." *Ellerth*, 524 U.S. at 764. This Court recently reaffirmed that *Ellerth* and *Faragher* are intended to create "a strong inducement" for employers to implement anti-harassment policies "as a way to break the circuit of imputed liability." *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 129 S. Ct. 846, 852 (2009).

Because the obligations of the employer and employee function together to help prevent, discover, and remedy sexual harassment, enforcement of the employee's obligation to report sexual harassment is critical to the effective functioning of the entire scheme: "The genius of the *Faragher-Ellerth* plan is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage . . . But that design works only if employees report harassment promptly." *Baldwin*, 480 F.3d at 1307. Just as it is important to provide robust protections against retaliation so employees are not deterred from reporting harassment, *See Crawford*, 129 S. Ct. at 852, it is equally important to ensure that employees have meaningful incentives to report harassment and are not lightly excused from utilizing valid employer procedures.

To give effect to the *Ellerth-Faragher* scheme, many circuits apply a strong presumption that a plaintiff must report harassment promptly (assuming that the employer has instituted an anti-harassment policy with complaint procedure). The Eleventh Circuit, for example, has held that the employee has the "obligation[] . . . to take full advantage of the employer's preventative measures" and that only "in extreme cases" could an employee's "reasons for not reporting harassment" be "good enough." *Baldwin*, 480 F.3d at 1306. The Eighth Circuit has stated that failure to complain "will *normally* suffice to satisfy the employer's burden under the second [prong]." *Adams*, 538 F.3d at 932 (emphasis added). And the Second Circuit has

expressed the inquiry in terms of a burden-shifting presumption:

> [O]nce an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures. The employer may rely upon the absence or inadequacy of such a justification in carrying its ultimate burden of persuasion.

Leopold, 239 F.3d at 246.

Faragher and *Ellerth* did not specify particular circumstances that would or would not excuse a plaintiff's failure to report harassment. But several circuits have recognized that to excuse such a failure on the basis of speculative, unsupported reasons would eviscerate the affirmative defense that this Court took pains to fashion. As these courts have recognized, because "the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims," *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000) (citation omitted), plaintiffs should be excused from their obligation to report sexual harassment only for reasons that are objectively supported and that transcend the run of the mill.[12]

---

[12] In the analogous context of exhaustion of union grievance procedures, it is well-settled that objective evidence is required before exhaustion is excused on grounds of futility. *See, e.g., Johnson v. District of Columbia*, 552 F.3d 806, 813 (D.C. Cir.

In particular, as the Eleventh Circuit has explained, subjective fears of retaliation may exist in every case, but this Court surely understood as much and did not go to the trouble of creating the affirmative defense intending that it be routinely defeated by unsupported speculation:

> Every employee could say . . . that she did not report the harassment earlier for fear of losing her job or damaging her career prospects. . . . [T]he Supreme Court undoubtedly realized as much when it designed the *Faragher-Ellerth* defense, but it nonetheless decided to require an employee to make the choice in favor of ending harassment if she wanted to impose vicarious liability on her employer. . . Were it otherwise, the *Faragher-Ellerth* defense would be largely optional with plaintiffs, and it would be essentially useless in furthering the important public policy of preventing sexual harassment.

Baldwin, 480 F.3d at 1307; *accord Pinkerton*, 2009 WL 1014589, *8 (excusing plaintiff's failure to report based on "subjective, ungrounded fears" would "completely undermine" *Faragher-Ellerth* framework). The Fourth Circuit similarly has explained that accepting "a speculative 'fear of

---

2008) (requiring "a clear and positive showing of futility") (quotation omitted); *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989) (same; "[t]hat [plaintiff] subjectively may have thought such procedures were futile is insufficient").

retaliation' excuse for remaining silent . . . would undermine the primary objective of Title VII and could result in more, not less, sexual harassment going undetected." *Barrett*, 240 F.3d at 267. Insisting on concrete, objective evidence does not mean assuming that retaliation never occurs, but rather that "[n]ormally bringing a retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation." *Adams*, 538 F.3d at 932-33 (citations omitted).

B. It Is Particularly Important For Plaintiffs To Fulfill Their Duty To Report Where, As Here, The Employer Has Fulfilled Its Duty Of Instituting A Proper Policy

This Court made clear that the duties of the employer and employee are complementary, operating together to achieve Title VII's goals. *See Faragher*, 524 U.S. at 764-65; *Ellerth*, 524 U.S. at 807. Where the employer has done its part, it is especially important for the employee to report harassment. That is true not only because the affirmative defense was designed to avoid automatic employer liability, but also because employers often will have no ability to "avoid[] harm" (*Faragher*, 524 U.S. at 806) caused by sexual harassment if the victim does not report it.

Moreover, the two prongs of the affirmative defense are related. Where an employer has put in place an adequate anti-harassment policy with complaint procedure, there should be less reason for the employee to believe that complaining will be

futile or lead to retaliation. The employer's fulfillment of its duty under the first prong thus heightens the employee's duty under the second prong: the more reasonably an employer has behaved in implementing an anti-harassment policy, the less reasonable it is for an employee to fail to take advantage of that policy. *Cf. McPherson v. City of Waukegan*, 379 F.3d 430, 442 (7th Cir. 2004) ("Since [plaintiff] does not dispute that the [employer] acted reasonably [under the first prong], the burden *was* on [plaintiff] to avail herself of these policies and procedures that she well knew were available to her.") (emphasis in original).

C. The First Circuit's Acceptance of Subjective, Unsupported Reasons For Failing To Report Vitiates The Affirmative Defense

Even before the decision below, the First Circuit had acknowledged that its interpretation of *Ellerth* and *Faragher* "creates a loophole for false and overstated claims of threat by one hoping to reach a sympathetic jury." *Reed*, 333 F.3d at 37. The decision below expands that loophole, essentially vitiates the careful balance struck by the Court in *Ellerth* and *Faragher*, and makes it crystal clear that the court below is in conflict with the circuits that have read *Ellerth* and *Faragher* to require that a plaintiff report sexual harassment absent a concrete, objective reason to forgo reporting. Those circuits have recognized that for the affirmative defense to play the important role for which this Court created it, the plaintiff's duty to report must be enforced, at least in ordinary cases.

The First Circuit, in contrast, has held that run-of-the-mill office camaraderie among managers entitles an employee to assume that reporting will be futile or provoke retaliation, even where there is no history of either and the employee concedes that she has no basis to question the integrity of the person to whom the report is supposed to be made.

If the view of the court below prevails, the affirmative defense will be "largely optional with plaintiffs, and . . . essentially useless in furthering the important public policy of preventing sexual harassment." *Baldwin*, 480 F.3d at 1307. Petitioner put in place a concededly adequate anti-harassment policy; petitioner was deprived of the opportunity to remedy the harassment of respondent because respondent chose for unsupported, subjective reasons not to report it; and petitioner nonetheless owes a very large judgment. An affirmative defense that is so easily evaded does not properly incentivize employers to put in place effective anti-harassment policies. *Cf. Crawford*, 129 S. Ct. at 852.

Nor does undermining the affirmative defense hurt employers alone. To the contrary, the Court fashioned the affirmative defense precisely because it recognized that all would benefit if the law encouraged "saving action" to prevent and stop sexual harassment, as opposed to litigation after it is too late. *See Faragher*, 524 U.S. at 807. All would agree that reporting sexual harassment may be difficult and unpleasant, *see, e.g.*, *Shaw*, 180 F.3d at 813, but that is why the Court created the affirmative defense in order to give victims the incentive to report and allow employers acting in good faith to address problems before they become

intractable. That is also why this Court in *Crawford* ensured that retaliation will not be excused based on technicalities. But neither should participation in valid complaint procedures be excused based on subjective fears. In neither case should the law encourage "prudent employees . . . to keep quiet about Title VII offenses." *Crawford*, 129 S. Ct. at 852.

Virtually all plaintiffs will be able to allege generalized concerns with futility or retaliation when it comes to reporting harassment by a supervisor to their employer. Moreover, it hardly can be exceptional for an anti-harassment policy to instruct that reports be made, as here, to someone in management, and it hardly is exceptional for the alleged harasser to be a supervisor rather than a low-level employee. Accordingly, if a victim could simply assume without evidence, as here, that management will stick together, then reports would be rare indeed. For these reasons, the decision below essentially vitiates the Court's work in *Ellerth* and *Faragher*. Apart from the need to resolve the circuit conflict, the Court should grant certiorari to ensure that the lower courts do not deprive its handiwork of meaning and effect. In order for the *Ellerth-Faragher* framework to accomplish its purpose, employees must be presumptively required to take advantage of reasonable employer policies, and reasons for failing to do so must be objectively supported and specific.

III. This Court's Guidance Is Needed, And This Case Is An Ideal Vehicle

A. Certiorari is warranted because the proper application of the *Ellerth-Faragher* affirmative defense is important both as a practical and policy matter. From a practical perspective, the issue is very frequently litigated. Employment discrimination cases represent more than 5% of all federal cases filed -- 13,375 cases in 2007 alone.[13] And the courts of appeals frequently address the *Ellerth-Faragher* defense: a Westlaw search for "(Ellerth Faragher) and 'affirmative defense'" returns 362 results for the courts of appeals. Moreover, the affirmative defense has been extended into contexts other than sexual harassment. *See, e.g., Williams v. Administrative Review Board*, 376 F.3d 471, 478 (5th Cir. 2004) (holding that *Ellerth-Faragher* is the appropriate standard for Energy Reorganization Act hostile-environment claim based on retaliation for whistleblowing, and noting that numerous other circuits have applied *Ellerth-Faragher* to racial harassment cases (citing cases from the 4th, 6th, 7th, 8th, and 10th circuits)); *Cardenas*, 269 F.3d at 261 n.6 (extending *Ellerth-Faragher* to national-origin harassment). And from a policy perspective, the goal that the Court sought to achieve in creating the defense -- preventing and stopping harassment -- remains vitally important, and undermining the defense imperils that goal. Title VII's "primary objective" remains "not to

---

[13] *See* AOUSC Table 4.4 (U.S. District Courts: civil cases filed, by nature of suit) (2000-2007) ("Civil Rights: Employment").

provide redress but to avoid harm." *Faragher*, 524 U.S. at 805.

B. This Court adopted the reasonableness standard for the duties of employers and employees at a high level of generality, even while recognizing that clarity and predictability are important. *See Faragher*, 524 U.S. at 805. It is understandable that this Court announced the rule in general terms in the first instance. Now, however, the lower courts have been applying and refining the affirmative defense for 11 years in dozens, if not hundreds, of cases, and an explicit, acknowledged split has developed. This Court emphasized in *Faragher* itself the importance of avoiding "disparate" results and the resulting "temptation to litigate." 524 U.S. at 805. This Court has reaffirmed the importance of the *Ellerth-Faragher* framework, *see Crawford*, 129 S. Ct. at 852, but the Court has not provided substantive guidance about how that framework should be applied. The decision below highlights the need for this Court's intervention to provide clarity for the application of the affirmative defense that the Court crafted.

C. This case presents an ideal vehicle to consider the question presented and to clarify the proper interpretation of *Ellerth* and *Faragher*. A significant advantage of this case is that it cleanly presents the question of the proper standard for the second prong of the affirmative defense, because petitioner concededly satisfied the first prong. Moreover, the factual record is clear and straightforward in important respects. First, it is undisputed that respondent failed to report the alleged harassment in any manner at any time

during her employment, rather than (as in some of the reported cases) merely delaying a report or making a report in an ambiguous or ineffective manner.[14] Second, it is undisputed that there was no history of reports pursuant to petitioner's policy proving futile or provoking retaliation.[15] Third, the record is devoid of any other objective basis for respondent to believe that reporting Arce's harassment to Executive Director Crespo would be futile or lead to retaliation.

In short, this case is an ideal vehicle for the Court to ensure the effective functioning of the *Ellerth-Faragher* framework by clarifying the contours of an employee's "reasonable" obligation to report sexual harassment pursuant to an adequate anti-harassment policy. The Court should grant certiorari and hold that failing to report sexual harassment based on nothing more than a generalized fear of retaliation or belief in futility, without objective support, is unreasonable.

---

[14] *See, e.g., Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005) ("when Hardage finally made his complaint he specifically asked the company not to investigate it"); *Madray*, 208 F.3d at 1302. Respondent's complete failure to report is "precisely the manner" in which "a victim of sexual harassment should *not* act in order to win recovery under [*Ellerth-Faragher*]." *Shaw*, 180 F.3d at 813 (emphasis in original).

[15] To the contrary, the only evidence admitted on the policy's application in other cases was Figueroa's testimony that he had used the complaint process and petitioner had responded promptly and effectively. SA-23-28.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY S. BUCHOLTZ
SARAH O. JORGENSEN
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
202-737-0500

PEDRO E. ORTIZ-ALVAREZ
JORGE MARTINEZ-LUCIANO
LAW OFFICES OF PEDRO
ORTIZ-ALVAREZ, PSC
P.O. Box 9009
San Juan, PR 00732
787-841-7575

Attorneys for Petitioner
Asociacion de Empleados del
Estado Libre Asociado de
Puerto Rico

MAY 2009

APPENDIX

United States Court of Appeals
For the First Circuit

No. 07-2341

MICHELLE MONTEAGUDO,

Plaintiff, Appellee,

v.

ASOCIACIÓN DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Gustavo A. Gelpí, U.S. District Judge]

Before

Torruella, Baldock,* and Howard,
Circuit Judges.

Jorge Martínez-Luciano, with whom Carmen Edith Torres-Rodríguez and Law Offices of Pedro Ortiz-Álvarez, PSC, were on brief for appellant.

Juan Rafael González-Muñoz, with whom González Muñoz Law Offices, P.S.C., María E. Margarida-Franco, Margarida Franco Law Office, and Carlos M. Vergne Law Offices, were on brief for appellee.

January 26, 2009

* Of the Tenth Circuit, sitting by designation.

TORRUELLA, Circuit Judge. Michelle Monteagudo brought suit alleging sexual harassment claims under federal and Puerto Rico law against her former employer, Asociación de Empleados del Estado Libre Asociado de Puerto Rico ("AEELA"),[1] in the United States District Court for the District of Puerto Rico. On June 1, 2007, a jury found that Monteagudo was subjected to sexual harassment in violation of Title VII of the Civil Rights Act and Puerto Rico Laws 17, 69, and 100, and awarded her compensatory and punitive damages. AEELA moved for judgment as a matter of law on the Faragher-Ellerth affirmative defense pursuant to Federal Rule of Civil Procedure 50 and also moved for a new trial and remittitur of the damages award pursuant to Federal Rule of Civil Procedure 59. AEELA appeals the district court's denial of both these motions as well as certain evidentiary and discovery rulings made during trial. After careful consideration, we affirm.

I. Background

A. Monteagudo's Experience at AEELA

Monteagudo started working at AEELA in 1999 as a secretary in the Human Resources department. At that time, she was a non-permanent employee, substituting for the permanent secretary who was out on maternity leave. Monteagudo was supervised by Juan Francisco Arce-Díaz ("Arce"), a payroll, fringe benefits, and compensation manager for AEELA. At trial, Monteagudo testified that during her time as a substitute, Arce "would look at

---

[1] AEELA is a non-profit savings and loans organization.

[her] as if he was appraising [her]." However, she "didn't give it much importance" because she did not view Arce's conduct to be that serious.

Monteagudo testified that Arce's conduct continued until Arce's permanent secretary returned from maternity leave, at which point Monteagudo stopped working in the Human Resources department. On October 2, 2000, after stints in AEELA's legal collections and legal affairs divisions, Monteagudo returned to the Human Resources department as a permanent employee. Once there, Monteagudo claimed that Arce engaged in inappropriate conduct towards her. For example, she remarked that Arce would come to her work station at least once a day where "he would stop and touch [her] on the shoulder." Monteagudo stated that she resisted Arce's advances by "throw[ing] his hand backwards so he'd leave [her] alone." She also complained that Arce would "invit[e] [her] constantly to go out together" with co-workers on double dates.

Monteagudo testified to the unpleasantness she felt as a result of Arce's conduct: "How can I feel except bad? They were treating me like a piece of meat. I wouldn't like to go to work . . . I didn't like to go into the office, because I knew what I would be involved and engaged in every day there."

On one such day, José Francisco Figueroa-Cana ("Figueroa"), a messenger for AEELA since 1996, witnessed Arce "plac[ing] his hand on [Monteagudo's] hip" in "an undesirable action." When he discussed this incident with Monteagudo, she told him that "that was something that normally took place . . . that [Arce] would always try to seek a

way so he could touch her." Figueroa testified that he was uncertain about what recourse Monteagudo should take because this was a matter that was "extremely difficult and quite delicate" given the people involved. Even though Figueroa was a union delegate, he decided against bringing the matter up to the union president because "it was extremely difficult to bring forth something like this dealing with who we dealt with," the union was a "very weak institution within AEELA," and because the union president had a "friendly relationship" with Orlando Vargas-López ("Vargas"), AEELA's Director of Human Resources and Labor Relations.

Monteagudo, perhaps partly as a result of her conversation with Figueroa, did not report Arce's conduct to her superiors as required by AEELA's sexual harassment policy.[2] This policy was in effect and distributed to Monteagudo while she was a permanent employee. At trial, Monteagudo explained that she did not report the sexual harassment "[b]ecause the person I needed to complain with were all friends." She added: "Either it be the executive director or the human resources

---

[2] Two provisions of AEELA's sexual harassment policy are relevant to this appeal. Section 3.2 of the policy states: "An employee who feels he has been sexually harassed at work in any way, should present his complaint to the Human Resources Department. If the alleged harasser should be this person, or anyone related or close to him, then the complaint must be presented directly to the Association's Executive Director." Section 3.3 of the policy states: "It is the responsibility of any employee who witnesses a sexual harassment act, or if any other employee has complained of being a victim of sexual harassment, to immediately inform the appropriate official."

director, they're all friends amongst themselves. We're talking about some managerials [sic] versus an employee who virtually had started working a few days before." She claimed that the Executive Director, Pablo Crespo-Claudio ("Crespo"), was friends with Vargas and Arce "[b]ecause of conversations held by Orlando Vargas and Francisco Arce themselves," noting that "I tend to understand that if some people go out together to drink liquor, they're friends who go out to be together." Crespo admitted in his testimony that he may have gone out for drinks with Vargas and Arce.

Monteagudo testified that Arce's inappropriate behavior towards her continued for several months leading up to an incident during a group outing to a local bar, where in the parking lot, Arce "pulled [her] towards him to try to kiss [her]." Monteagudo pushed him away that evening, but testified that when she returned to work the following Monday after the incident "the attitude displayed towards [her] by Mr. Vargas and Mr. Arce" was "different" and that the additional work given to her was excessive. Also, when she complained to Vargas that she was performing two positions simultaneously, in addition to assisting colleagues from other divisions, Vargas "slammed the desk very hard and told [her] that if [she] filed a complaint, the next day [she] would be dismissed."

At trial, Monteagudo described her work conditions as intolerable due to the fact that her superiors did not permit "anyone at all to stop over to talk to [her], even to just say good morning." Further, she explained the emotional toll AEELA's actions took on her: "[E]very evening I'd be crying, I

would leave work crying, because there was a constant scolding for everything, everything I did was wrong. Everything." Thus, Monteagudo stated that she was left with no choice but to resign, resulting in what the jury later found to be a constructive discharge: "Obviously, if somebody is putting so much pressure on you and threatening to kick you out if you complain before the union, obviously that person doesn't want to have you there anymore. And that's why I resigned."

B. AEELA's Motions

At the end of Monteagudo's presentation of her argument, AEELA orally moved for judgment as a matter of law under Rule 50 stating the following: "At this time we want to move for judgment as a matter of law, not on the merits of the case, which are obviously subject to credibility issues for the jury, but on the subject of [the] affirmative defense limited by the Supreme Court in the case of Ellerth and Faragher regarding vicarious liability by an employer." AEELA noted that its motion was based on this "single discrete issue." The district court denied AEELA's motion. At the close of all evidence and before the case went to the jury, AEELA renewed its motion under "the Faragher issue" stating that "[p]retty much in our case in chief, nothing further was added, as far as factually towards this defense. It would be the same arguments of law and fact, but we need to raise it to preserve it." The district court again denied AEELA's motion.

On June 1, 2007, the jury found Monteagudo was subjected to sexual harassment in violation of

Title VII and Puerto Rico Laws 17, 69, and 100,[3] and awarded her compensatory and punitive damages.[4] On June 15, 2007, AEELA again filed a motion for

---

[3] Law 17 prohibits sexual harassment in employment. 29 P.R. Laws Ann. § 155. Law 69 prohibits employment discrimination on account of gender. 29 P.R. Laws Ann. § 1321. Law 100 is analogous to Title VII and prohibits discrimination on the basis of age, race, color, sex, social or national origin, social condition, political affiliation, political or religious ideology. 29 P.R. Laws Ann. § 146.

[4] The jury found by a preponderance of evidence that (1) "[Monteagudo] was constructively discharged from her employment at AEELA specifically as a consequence of sexual harassment; (2) "AEELA approved an anti-sexual harassment policy which provided the procedure for employees to channel their claims and that the policy was disseminated among the employees"; (3) Monteagudo was not unreasonable in her "fail[ure] to use the procedure provided in the anti-sexual harassment policy in effect at AEELA; and that (4) "she was subjected to a sexually hostile work environment in violation of Puerto Rico law."

The jury also found that the amount of compensatory damages that "Monteagudo suffered as a proximate result of the sexually hostile work environment to which she was subjected by AEELA" totaled $333,000 and that Monteagudo should be awarded $300,000 in punitive damages.

On the same day, the district court entered an order modifying the judgment because the jury did not apportion the compensatory damage award between the Puerto Rico and federal Title VII claims. Accordingly, the district court ruled that it "allocates $1 of the compensatory damages to the Title VII claim and the remaining $332,999.00 to the Commonwealth claims" and "[p]ursuant to the damages provisions of Puerto Rico Laws 17, 69, and 100, the court will double the compensatory damages under the Commonwealth claims." As a result, Monteagudo's total award was $965,999.

judgment as a matter of law on the basis that Monteagudo was not subjected to a "severe or pervasive" hostile work environment and that AEELA met the burden of proof required in the Faragher-Ellerth defense. AEELA argued that no reasonable jury could find that Monteagudo's failure to use the procedures specified by AEELA's sexual harassment policy was reasonable. AEELA also moved for a new trial and for remittitur of the damages award.

The district court denied AEELA's motion for judgment as a matter of law, noting first that AEELA did not object to the court's instruction on the Faragher-Ellerth defense. The district court then offered the following reasons for its denial of AEELA's motion:

> At trial, Plaintiff testified that her supervisor, Arce, sexually harassed her by repeatedly touching her on the shoulders, asking her out, and one occasion trying to kiss her. She also testified that Vargas, Defendant's Human Resources Director, was aware of Arce's unlawful behavior and was an active participant in the harassment. Vargas, on another occasion, had threatened to fire Plaintiff if she complained about excessive workload. Finally, Plaintiff testified that Pablo Crespo, Defendant's Executive Director, was friends with Arce and Vargas. Plaintiff's testimony was bolstered by Figueroa Cana, another of Defendant's

> employee [sic], who said during trial that he had told Plaintiff that she did not have a real opportunity of obtaining relief because of the high ranking officers involved in the harassment and cover up. In light of the above, the court cannot conclude that no reasonable jury could have found that Plaintiff acted reasonably when she failed to follow Defendant's anti-sexual harassment policy.

In a separate order, the district court denied AEELA's motion for a new trial on damages noting that "the verdict of $965,999.00 is in part the result of Puerto Rico Laws 17, 69, and 100, which double the plaintiff's compensation." AEELA appeals the district court's ruling on these two motions as well as certain discovery and evidentiary rulings at trial.

II. Discussion

C. AEELA's Motion for Judgment as a Matter of Law

1. Standard of Review

Our review of a denial of a motion for judgment as a matter of law under Fed. R. Civ. P. 50 is de novo, "viewing the evidence in the light most favorable to the nonmoving party." Marcano Rivera v. Turabo Med. Ctr. P'ship, 415 F.3d 162, 167 (1st Cir. 2005) (quoting Tapalian v. Tusino, 377 F.3d 1, 5 (1st Cir. 2004)). We note that "[a] party seeking to overturn a jury verdict faces an uphill battle," id., and that our "review is weighted toward preservation of the jury verdict . . . ." Crowe v. Bolduc, 334 F.3d 124, 134 (1st Cir. 2003). "Courts

may only grant a judgment contravening a jury's determination when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." Marcano Rivera, 415 F.3d at 167 (quoting Rivera Castillo v. Autokirey, Inc., 379 F.3d 4, 9 (1st Cir. 2004)).

Here, although AEELA makes several claims on appeal of the denial of its Rule 50 motion,[5] we consider preserved only its claim regarding the Faragher-Ellerth affirmative defense. As we recently reasoned:

> A motion under Fed. R. Civ. P. 50(a) must "specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). The motion "must be sufficiently specific so as to apprise the district court of the grounds relied on in support of the motion." Zachar v. Lee, 363 F.3d 70, 73 (1st Cir. 2004) (citing Correa v. Hosp. San Francisco, 69 F.3d 1184, 1196 (1st Cir. 1995)). Such a motion "preserves for review only those grounds specified at the time, and no others." Id. (quoting Correa, 69 F.3d at 1196) . . . But, "[a]s the name implies, a renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) is bounded by the

[5] Although raised in an inartful manner on appeal, we consider infra AEELA's challenges to the district court's rulings on certain evidentiary and discovery issues at trial.

> movant's earlier Rule 50(a) motion." Correa, 69 F.3d at 1196. "The movant cannot use such a motion as a vehicle to introduce a legal theory not distinctly articulated in its close-of-evidence motion for a directed verdict." Id.

Parker v. Gerrish, 547 F.3d 1, 12 (1st Cir. 2008). AEELA stated that it wished to preserve only one issue in its Rule 50(a) motion; thus, the only issue that we consider pursuant to its renewed motion is whether AEELA is entitled to the Faragher-Ellerth defense.

2. AEELA's Affirmative Defense

We have explained the Faragher-Ellerth defense as following:

> Under Title VII, an employer is subject to vicarious liability for sexual harassment by an employee's supervisor which does not constitute a tangible employment action. But the employer may prevail if it demonstrates a two-part affirmative defense: that its own actions to prevent and correct harassment were reasonable and that the employee's actions in seeking to avoid harm were not reasonable.

Chaloult v. Interstate Brands Corp., 540 F.3d 64, 66 (1st Cir. 2008) (citing Faragher v. City of Boca

Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998)).[6]

The parties agree that the sexual harassment policy AEELA had in place was sufficient for it to meet the first prong of the defense. See Arrieta-Colón v. Wal-Mart P.R., Inc., 434 F.3d 75, 86 (1st Cir. 2006) ("As to the first element of the defense, proof of an anti-harassment policy with a complaint procedure available to employees, while not necessarily dispositive, is relevant."); Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 21 (1st Cir. 2002) ("[T]he availability of the affirmative defense often will turn on whether the employer had established and disseminated an anti-discrimination policy, complete with a known complaint procedure."). Thus, Monteagudo concedes "that the only matter for consideration under the [Faragher-Ellerth] defense is the second prong of the defense."

Regarding the second prong, in Reed v. MBNA Marketing Systems, Inc., we remarked that while "[t]here is no bright-line rule as to when a failure to file a complaint becomes unreasonable . . . more than ordinary fear or embarrassment is needed." 333 F.3d 27, 35 (1st Cir. 2003). As set forth above, AEELA's sexual harassment policy states that an employee who is a victim of sexual harassment should first present her complaint to the Human

---

[6] In the motion for judgment as a matter of law below there was some dispute among the parties as to whether a constructive discharge constitutes a "tangible employment action" for the purposes of the Faragher-Ellerth defense. However, the district court did not address this issue in its opinion and Monteagudo does not raise this issue here.

Resources department, unless the alleged harasser is within or close to someone within the department. If this is the case, as it is here given our facts, the employee is required to report the sexual harassment to AEELA's Executive Director. Thus, we must determine whether a jury could conclude that Monteagudo's reasons for failing to report Arce's conduct to her superiors was unreasonable.

From our review of the record, Monteagudo presented several reasons for not reporting the sexual harassment to Vargas. Vargas admitted that he was friends with Arce. Monteagudo also testified that Vargas and Arce would often go out drinking together. Monteagudo was thus understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas's relationship with Arce.

The more difficult question, however, is whether Monteagudo's failure to report Arce's conduct to Crespo was unreasonable on the basis of Crespo's alleged friendship with Arce and Vargas. The only evidence that Monteagudo proffers for this friendship are conversations she overheard by Vargas and Arce and the fact that Crespo testified that he may have gone out with Arce for drinks. Admittedly, Monteagudo did not establish Crespo's relationship with Arce as clearly as she established Vargas's relationship with Arce; however, as we acknowledged in Reed, "juries are supposed to be good at detecting false claims and at evaluating reasonable behavior in human situations." Id. at 37.

Further, other factors that the jury could have taken into account in deciding that it was reasonable for Monteagudo not to report to her superiors

included Figueroa's advice to her that the matter was "extremely difficult and quite delicate" given the people involved, and the fact that witnesses to the alleged harassment failed to report the sexual harassment as well.[7] In addition, there was a significant age differential between Monteagudo, 22, and Arce, 45, when the harassment occurred. Although Monteagudo was not a minor as was the plaintiff in Reed, her relative youth compared to Arce bears at least some relevance. See id. (noting that a jury could consider the trauma inflicted by a supervisor who was more than double the age of a seventeen year old whom the supervisor was alleged to have assaulted). While Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could conclude that her failure to report was based on "more than ordinary fear or embarrassment" and was therefore reasonable.[8]

---

[7] Monteagudo testified that Vargas and her colleague, Marilyn Del Valle-Cruz ("Del Valle"), were aware of the sexual harassment. Although Vargas and Del Valle deny knowledge of the sexual harassment, the jury was entitled to believe Monteagudo's version given the facts surrounding the case.

[8] AEELA also maintains that a jury could not reasonably conclude that Monteagudo's failure to file a complaint with her union pursuant to the collective bargaining agreement was reasonable. We disagree. Monteagudo was advised by Figueroa, a union delegate, that filing a complaint would be futile because the matter involved people that made it "extremely difficult and quite delicate"; that the union was weak; and that the union president was friendly with Vargas. Furthermore, Monteagudo stated that the union was unresponsive to a prior complaint she had filed on an unrelated matter.

D. AEELA's Evidentiary Claim

1. Standard of Review

We review a trial court's decision to admit or exclude evidence for abuse of discretion. McDonough v. City of Quincy, 452 F.3d 8, 19 (1st Cir. 2006). "A district court has broad discretion to make relevancy determinations . . . ." Richards v. Relentless, Inc., 341 F.3d 35, 49 (1st Cir. 2003). Erroneous evidentiary rulings are harmless "if it is highly probable that the error did not affect the outcome of the case." McDonough, 452 F.3d at 19-20.

2. The Challenged Testimony

AEELA argues that the district court erred in disallowing testimony from Blanca Medina, AEELA's Director of Administrative and Legal

---

We note here AEELA's claim that Monteagudo did not produce a copy of this prior complaint during discovery, even though AEELA had requested it. AEELA contends that the district court erred by disallowing AEELA to pursue a line of questioning "directed towards discrediting Monteagudo's testimony about supposedly having filed the grievance at issue." Further, AEELA asserts that the district court erred by stating that AEELA had not previously moved to compel the document. We agree with the district court that this was a discovery issue that AEELA should have addressed earlier either by way of a motion to compel or a request for sanctions under Fed. R. Civ. P. 37(c). However, even if we were to decide otherwise, any error would be harmless as the jury could have concluded that Monteagudo was reasonable in her decision not to file a complaint with the union based on the other reasons articulated above. In any event, we are hard pressed to see how AEELA was disadvantaged as the district court allowed AEELA to ask Monteagudo a series of questions about the document and its whereabouts for purposes of impeachment.

Affairs, regarding whether AEELA had successfully employed a corrective measure in 2005 pursuant to the sexual harassment policy. Monteagudo had objected to this testimony, stating that Medina's testimony on this issue was not "pertinent at this time." Upon Monteagudo's objection, the parties approached the bench and a colloquy ensued between the parties and the district court.[9] This

---

[9] The transcript of the bench conference reads as follows:

> The Court: I think I should instruct the jury -- she already gave that answer. I should instruct the jury that the fact that in 2005 corrective measures were taken is not evidence of what happened in this case.
>
> Mr. Martínez-Luciano [AEELA's counsel]: The reason why I'm asking about this is because part of plaintiff's theory as stated today in opening statements . . . [is] that the proceedings in AEELA are not worth following, that they're not effective.
>
> Mr. González-Muñoz [Monteagudo's counsel]: No. What I said during opening statement was that it was not followed in Michelle's case, and limited myself to this case. It's not that [AEELA's harassment policy] is ineffective. In this case it was not followed. That's what I said in opening statements.
> Mr. Martínez-Luciano: It's not a theory you're going to pursue in closing arguments?
>
> Mr. González-Muñoz: No, no. I'm here for Michelle's case.
>
> The Court: I'm not going to strike the testimony at this time. Careful with the question. Whatever she stated in 2005 is not

exchange resulted in the apparent agreement by AEELA to the following instruction given to the jury immediately after the bench conference:

> The witness stated that in 2005, certain procedures were followed in another case. We're not going to go into that line of questioning. And so that what she was saying, we're not going to continue further, but let me instruct the jury that the fact that certain procedures may have been followed in 2005, they're not conclusive, they're not probative of whatever may have happened in 2002. So in that effect, in that regard, you're not to consider that statement as probative one way or the other of what may have happened in 2002.

From this exchange, it is not clear whether AEELA preserved its opposition to the court's evidentiary ruling because AEELA consented to the court's decision to give a jury instruction.[10] Assuming that AEELA has preserved the issue for

---

> probative of what may have happened or not happened in 2002.
>
> Mr. Martínez-Luciano: Okay.

[10] At closing argument Monteagudo's counsel stated that AEELA's sexual harassment policy "had been proven defective." Upon AEELA's objection, the court directed Monteagudo's counsel to correct himself by explaining to the jury that any argument regarding the application of the policy's effectiveness pertains to Monteagudo only.

appeal, however, the district court did not err by excluding the testimony on relevance grounds. Unlike other circuits, we have not required that in order to overcome the second prong of the Faragher-Ellerth affirmative defense, plaintiffs must produce evidence demonstrating "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." See, e.g., Leopold v. Baccarat, Inc., 239 F.3d 243, 246 (2d Cir. 2001). Here, since Monteagudo limited her argument to the application of AEELA's policy to her case, the district court was within its discretion to exclude as not relevant AEELA's attempt to show that it had taken corrective measures pursuant to the policy in 2005.

E. AEELA's Motion for New Trial and Remittitur of Damages

1. Standard of Review

AEELA also appeals the district court's denial of its motion for new trial or remittitur under Fed. R. Civ. P. 59. "'A district court should only grant such motions if the outcome is against the clear weight of the evidence such that upholding the verdict will result in a miscarriage of justice.'" Marcano Rivera, 415 F.3d at 171 (quoting Johnson v. Spencer Press of Me., Inc., 364 F.3d 368, 375 (1st Cir. 2004)). We review for abuse of discretion. Id.

2. Damages

a. Compensatory Damages

"'[A] party seeking remittitur bears a heavy burden of showing that an award is grossly excessive, inordinate, shocking to the conscience of

the court, or so high that it would be a denial of justice to permit it to stand.'" Id. at 173 (alteration in original) (quoting Currier v. United Techs. Corp., 393 F.3d 246, 256 (1st Cir. 2004)). "[T]he Supreme Court of Puerto Rico has indicated that it 'will not intervene in the decision on the estimation of damages issued by the lower courts, unless the amounts granted are ridiculously low or exaggeratedly high.'" Id. at 172 (quoting Nieves Cruz v. Universidad de Puerto Rico, 151 P.R. Dec. 150 (2000) (certified translation)). Thus, "Puerto Rico's 'exaggeratedly high' standard echoes the federal 'grossly excessive' standard." Id. We stress that "only infrequently -- and then, for compelling reasons -- will we, from the vantage point of an algid appellate record, override the jury's judgment as to the appropriate amount of non-economic damages to which a plaintiff is entitled." Casillas-Díaz v. Palau, 463 F.3d 77, 82-83 (1st Cir. 2006).

Here, the jury awarded Monteagudo $333,000 in compensatory damages without apportioning the award between the Puerto Rico and the Title VII claims. The jury also awarded Monteagudo $300,000 in punitive damages under Title VII. Upon Monteagudo's motion, the district court issued an order allocating $1 of the compensatory damages award to the Title VII claims and the remaining $332,999 to the claims under Puerto Rico laws 17, 69, and 100.[11] The district court then doubled the

---

[11] "In this circuit, punitive damages may not be awarded under Title VII without the award of at least nominal compensatory damages." Rodríguez-Torres v. Caribbean Form Mfr., Inc., 399 F.3d 52, 65 (1st Cir. 2005).

amount awarded pursuant to the Puerto Rico claims as required by Puerto Rico law, resulting in a total award amount of $965,999. See P.R. Laws Ann. tit. 29, § 155j(1); P.R. Laws Ann. tit. 29, § 146(a)(1); P.R. Laws Ann. tit. 29, § 1341(a)(1).

With respect to compensatory damages, we hold that the jury's award here of $333,000 was neither "grossly excessive" to "shock the conscience" of this court, nor was it "exaggeratedly high." Admittedly the jury was generous in awarding this amount; however, the district court did not abuse its discretion in deciding that the award was proportionate to harm suffered by Monteagudo. As we expressed above, as a result of the sexual harassment she endured for several months, Monteagudo felt "like a piece of meat" and wept every evening. After her constructive discharge, she testified that she suffered from depression and an inability to sleep. We note that a "verdict approved by both the jurors and the trial judge will be pared 'only if it is shown to exceed any rational appraisal or estimate of the damages that could be based upon the evidence before the jury.'" Casillas-Díaz, 463 F.3d at 83 (quoting Dopp v. Pritzker, 38 F.3d 1239, 1249 (1st Cir. 1994)). Given our facts and the highly deferential standard we must apply, this is not such a case. Moreover, the jury award here is commensurate with non-economic compensatory damage awards we have upheld in other Title VII and employment discrimination contexts.[12]

---

[12] See McDonough, 452 F.3d at 22 (upholding $300,000 compensatory damages award where "bulk of the award" was for emotional distress in the form of humiliation, damage to reputation, and strained family relations); Valentín-Almeyda v.

b. Punitive Damages

We review a preserved challenge to a punitive damages award de novo. Acevedo-García v. Monroig, 351 F.3d 547, 566 (1st Cir. 2003). Where a challenge to a punitive damages award is not preserved, as is the case here, we review for plain error. Rodríguez-Torres, 399 F.3d at 64; Chestnut v. City of Lowell,

---

Municipality of Aguadilla, 447 F.3d 85, 103 (1st Cir. 2006) (upholding compensatory damages award of $705,000 on the basis of harassment and threat of reprisals where plaintiff suffered emotional damages and mental anguish such as insomnia, anxiety, guilt, and depression as well as serious economic damages); Rodríguez-Torres, 399 F.3d at 64 (upholding on plain error review emotional distress damages of $250,000 in case involving claims under Title VII, Law 69, and Law 100 where Plaintiff "experienced financial difficulties, her marriage suffered, she entered a deep depression which lasted 'for quite some time,' and, because of the depression, she had difficulty finding subsequent employment"); Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 36-37 (1st Cir. 2003) (upholding $125,000 compensatory damages award for emotional distress including stress and anxiety disorders and irritable bowel syndrome); Kerr-Selegas v. American Airlines, Inc., 69 F.3d 1205, 1214 (1st Cir. 1995) (upholding $300,000 compensatory damage award on Title VII retaliation claim before doubling of award under Puerto Rico law); see also Muñiz-Olivari v. Stiefel Labs., Inc., 496 F.3d 29, 40-41 (1st Cir. 2007) (analogizing to Title VII law and holding that pain and suffering damages of $100,000 to husband and wife each was not excessive); cf. Soto-Lebrón v. Fed. Express Corp., 538 F.3d 45, 70 (1st Cir. 2008) (holding that $1,800,000 emotional damages award on libel claim was excessive in part because "there is an identifiable legal error that is at the heart of the jury's inflated award"); Koster v. Trans World Airlines, 181 F.3d 24, 35-36 (1st Cir. 1999) (holding emotional damage award of $716,000 as excessive and reducing it to $250,000 where employer's conduct resulted in Plaintiff having trouble sleeping, anxiety, and family suffering).

305 F.3d 18, 20 (1st Cir. 2002). AEELA can prevail on plain error review if it demonstrates that:

> (1) an error was committed; (2) the error was plain (i.e.[,] obvious and clear under current law); (3) the error was prejudicial (i.e.[,] affected substantial rights); and (4) review is needed to prevent a miscarriage of justice, meaning that the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

Díaz-Fonseca v. Puerto Rico, 451 F.3d 13, 36 (1st Cir. 2006) (internal quotation marks omitted).

Here, we disagree with AEELA's claim that it properly preserved its challenge to the punitive damages award by filing a timely motion under Rule 59(a). In its new trial and remittitur motion, AEELA did not provide any developed argumentation as to why Monteagudo should not be entitled to punitive damages. Further, AEELA did not cite any cases for its proposition that punitive damages are unwarranted. "[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal." McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991). "This prophylactic rule requires litigants to spell out their legal theories face-up and squarely in the trial court; if a claim is 'merely insinuated' rather than 'actually articulated,' that claim ordinarily is deemed unpreserved for purposes of appellate review." Iverson v. City of Boston, 452 F.3d 94, 102 (1st Cir. 2006) (quoting McCoy, 950 F.2d at 22); see also In re

Olympic Mills Corp., 477 F.3d 1, 17 (1st Cir. 2007) (holding a claim against damages award waived because "as presented to the district court . . . the argument was fatally undeveloped, comprising only four sentences, a citation to a district court opinion, and no analysis whatsoever").

Applying the plain error standard, then, we must first decide whether the district court committed an error. "Title VII authorizes punitive damages when a plaintiff demonstrates that the defendant engaged in intentional discrimination 'with malice or reckless indifference to the federally protected rights of an aggrieved individual.'" Rodríguez-Torres, 399 F.3d at 64 (quoting 42 U.S.C. 1981a(b)(1)). In Kolstad v. American Dental Ass'n., 527 U.S. 526 (1999), the Supreme Court set forth a framework for determining the appropriateness of punitive damages. Following Kolstad, once a plaintiff has shown that "the employer acted with malicious or reckless indifference to the plaintiff's federally protected rights," "she then must establish a basis for imputing liability to the employer." Rodríguez-Torres, 399 F.3d at 64. We have stated that "the plaintiff may meet this burden by showing that the employee who discriminated against her was a managerial agent acting within the scope of his employment." Id. "[E]ven if the plaintiff makes these showings, the employer still may avoid punitive liability by showing that it engaged in good faith efforts to implement an anti-discrimination policy." Id. "Demonstrating good faith compliance is an affirmative defense, and the burden of proof therefore rests with the employer." Id.

Here, a reasonable jury could conclude that Arce was acting in a managerial capacity when engaging in the acts of sexual harassment. Also, as a supervisor, Arce should have been aware that his actions were against AEELA's sexual harassment policy and federal law. A closer question is whether AEELA was entitled to its affirmative defense of good faith compliance, especially in view of the jury's finding that AEELA had satisfied the first prong of its Faragher-Ellerth defense. The question before us then is whether the fact that AEELA had a sexual harassment policy in place that was disseminated to its employees was sufficient to show "good faith compliance" in order to avoid punitive damages.

We have stated that while "a written non-discrimination policy is one indication of an employer's efforts to comply with Title VII. . . . a written statement, without more, is insufficient to insulate an employer from punitive damages liability." Romano v. U-Haul Int'l, 233 F.3d 655, 670 (1st Cir. 2000). From our review of the record, AEELA has not provided sufficient proof that it had in place an "active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials";[13] "testimony by appellants' witnesses that indicated that supervisors were trained to prevent discrimination from occurring;" or "examples

---

[13] Notably, Monteagudo testified that she had never been offered a seminar on sexual harassment and that she was unaware if any sexual harassment seminars had been given to her supervisors.

in which their anti-discrimination policies were successfully followed."[14] Id. (providing a non-exhaustive list of ways an employer could demonstrate good faith compliance). While having all of these factors is not necessary to qualify for the defense, see id., AEELA has not provided sufficient evidence that it fulfilled any of these factors. Thus, the district court did not commit plain error in upholding the punitive damages award and denying a new trial on damages.

III. Conclusion

For the foregoing reasons, the district court judgment is affirmed.

Affirmed.

---

[14] We acknowledge that AEELA was rebuffed by the district court in its attempt to show how its policy was successfully implemented in 2005. However, as we noted in assessing AEELA's evidentiary claim above, this evidence was not proffered to show that AEELA should not have been liable for punitive damages. Rather, AEELA attempted to introduce Medina's testimony in order to bolster its Faragher-Ellerth defense. This was evidence which the district court was within its discretion to exclude. Even if the district court had considered the 2005 corrective measure AEELA had employed pursuant to its policy, the district court still did not commit plain error in upholding the punitive damages award. This is because AEELA failed to provide sufficient evidence of other indicators of good faith compliance and because the 2005 corrective measure occurred three years after the sexual harassment in this case. See id.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Michelle Monteagudo,

Plaintiff,

Civil No. 03-2357 (GAG)

v.

Asociacion de Empleados del Estado
Libre Asociado de Puerto Rico,

Defendant.

OPINION AND ORDER

This is an action for hostile work environment sexual harassment. The matter is before the court on Defendant's motion for judgment as a matter of law. In this motion, Defendant asks the court to set aside the jury verdict in Plaintiff's favor and enter judgment in Defendant's favor on the ground that it met the burden of proof required under the Faragher/Ellerth defense.[1] After reviewing the pleadings and pertinent law, the court DENIES

1 Defendant also argues that no reasonable jury could have found that Plaintiff was subjected to a severe and pervasive hostile work environment. Because Defendant did not raise this issue in its requests for judgment as a matter of law during trial under Rule 50(a), the court finds that Defendant waived this sufficiency of the evidence challenge. See Casillas-Diaz v. Palau, 463 F.3d 77, 81 (1st Cir. 2006) (noting that "a party cannot use a Rule 50(b) motion as an instrument for introducing a neoteric legal theory - one not distinctly articulated in his end-of-the-evidence motion for judgment as a matter of law - into the case").

Defendant's motion for judgment as a matter of law (Docket No. 125).

I. Relevant Factual and Procedural Background

On December 22, 2003, Plaintiff filed this action, alleging that she was subjected to *quid pro quo* and hostile work environment sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and Puerto Rico Laws 17, 69, 100, and 115. See Docket No. 1. On March 31, 2006, the court dismissed Plaintiff's *quid pro quo* sexual harassment claim under Title VII and her retaliation claims under Title VII and Puerto Rico Law 115. See Docket No. 61.

Trial began on May 29, 1007. See Docket No. 107. On two different occasions, at the end of the Plaintiff's case and before the case was submitted to the jury, Defendant requested the entry of judgment as a matter of law on the Faragher/Ellerth defense. The court denied both requests. See Docket No. 109. On June 1, 2007, the jury found that Plaintiff was subjected to sexual harassment in violation of Title VII and Puerto Rico Laws 17, 69, and 100, and awarded Plaintiff money for compensatory and punitive damages. See Docket No. 114. On the same date, the court entered judgment accordingly. See Docket No. 118.

On June 15, 2007, Defendant filed a motion for judgment as a matter of law. See Docket No. 125. Plaintiff opposed Defendant's motion on June 25, 2007. See Docket No. 130. On June 26, 2007, Defendant replied to Plaintiff's opposition. See

Docket No. 131. Plaintiff filed a sur-reply on June 27, 2007. See Docket No. 134.

II. Standard of Review

The court's review of a renewed motion for judgment as a matter of law is very limited. A motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure may be granted only when there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party. See Richards v. Relentless, Inc., 342 F.3d 35, 41 (1st Cir. 2003); Guilloty Perez v. Pierluisi, 339 F.3d 43, 50 (1st Cir. 2003). "A party seeking to overturn a jury verdict faces an uphill battle." See Marcano Rivera v. Turabo Med. Ctr. P'ship, 415 F.3d 162, 168 (1st Cir. 2005). "Courts may only grant a judgment contravening a jury's determination when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." Id. (quoting Rivera Castillo v. Autokirey, Inc., 370 F.3d 4, 9 (1st Cir. 2004)). See also Acevedo-Garcia v. Monroig, 351 F.3d 547, 565 (1st Cir. 2003); Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755, 759-60 (1st Cir. 1994).

A motion for judgment as a matter of law may only may granted if "the evidence together with all reasonable inferences in favor of the verdict, could lead a reasonable person to only one conclusion, namely, that the moving part [is] entitled to judgment." PH Group Ltd. V. Birch, 985 F.2d 649, 653 (1st Cir. 1993). In evaluating the evidence, however, the court "may not assess the credibility of witnesses, evaluate the weight of the evidence or

resolve conflicts in testimony, but must view all facts and reasonable inferences therefrom in the light most favorable to the nonmovant." Davet v. Maccarone, 973 F.2d 22, 28 (1st Cir. 1992).

III. Legal Analysis

Defendant has moved for judgment as a matter of law on the ground that it met the burden of proof required under the Faragher/Ellerth defense. In the Faragher/Ellerth decisions, the Supreme Court devised a special framework for imposing vicarious liability on employers in cases involving harassment by supervisors. Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27, 32 (1st Cir. 2003). The Court wrote identically in both opinions:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, *see* Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or

> corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher v. City of Boca Raton, 524 U.S. 807, 808 (1998); Burlington Indus. v. Ellerth, 524 U.S. 764, 756 (1998).

At the close of the evidence in this case, the court instructed the jury on the Faragher/Ellerth defense. See Docket No. 111. Defendant did not object to this instruction. After deliberating for half a

day, the jury found that Defendant approved an anti-sexual harassment policy which was disseminated among the employees, but did not find that Plaintiff unreasonably failed to use the procedures provided in the policy. See Docket No. 114. In this motion for judgment as a matter of law, Defendant claims that no reasonable jury could have found that Plaintiff acted reasonably when she failed to follow Defendant's anti-sexual harassment policy. The court disagrees.

Defendant's anti-sexual harassment policy provides that an employee who feels that she was the victim of sexual harassment should first attempt to discuss the matter with the Human Resources Director. If the Director is the person involved or has some relationship with the harasser, then the employee should discuss the matter with the Executive Director. At trial, Plaintiff testified that her supervisor, Arce, sexually harassed her by repeatedly touching her on the shoulders, asking her out, and on one occasion trying to kiss her. She also testified that Vargas, Defendant's Human Resources Director, was aware of Arce's unlawful behavior and was an active participant in the harassment. Vargas, on another occasion, had threatened to fire Plaintiff if she complained about excessive workload. Finally, Plaintiff testified that Pablo Crespo, Defendant's Executive Director, was friends with Arce and Vargas. Plaintiff's testimony was bolstered by Figueroa Cana, another of Defendant's employee, who said during trial that he had told Plaintiff that she did not have a real opportunity of obtaining relief because of the high ranking officers involved in the harassment and cover up. In light of the above,

the court cannot conclude that no reasonable jury could have found that Plaintiff acted reasonably when she failed to follow Defendant's anti-sexual harassment policy.

IV. Conclusion

For the foregoing reasons, Defendant's motion for judgment as a matter of law (Docket No. 125) is hereby DENIED.

SO ORDERED.

In San Juan, Puerto Rico this 2nd day of August 2007.

S/Gustavo A. Gelpí

GUSTAVO A. GELPI
United States District
Judge

United States Court of Appeals
For the First Circuit

No. 07-2341

MICHELLE MONTEAGUDO

Plaintiff · Appellee

v.

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO

Defendant · Appellant

Before

Lynch, Chief Judge,
Torruella, Baldock,* Boudin,
Lipez, and Howard,
Circuit Judges.

ORDER OF COURT

Entered: February 20, 2009

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk

*Of the Tenth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
JUL 27 2009
OFFICE OF THE CLERK

No. 08-1454

In The Supreme Court of the United States

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,

Petitioner,

v.

MICHELLE MONTEAGUDO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARLOS M. VERGNE
24 Mariana Bracetti,
Second Floor
San Juan, PR 00925

JUAN RAFAEL GONZÁLEZ MUÑOZ
Counsel of Record
MARIA ELENA MARGARIDA-FRANCO
GONZÁLEZ MUÑOZ LAW OFFICE PSC
PMB 608
89 De Diego Ave., Suite 105
San Juan, PR 00927
(787) 766-5052

Counsel for Respondent

July 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the evidence presented at trial permitted a reasonable jury to find that Monteagudo's failure to invoke the employer's reporting mechanism was reasonable, thus precluding petitioner from entitlement to the affirmative defense to liability for sexual harassment by supervisors under Title VII established by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

TABLE OF CONTENTS

Page

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 10

I. The Decision Below Does Not Create A Conflict Between The Circuits On What Constitutes Objective Reasonability For An Employee To Bypass A Valid Complaint Procedure 14

II. This Case Is An Inappropriate Vehicle To Address The Question Presented Even If Guidance Were Necessary 30

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Adams v. O'Reilly Automotive, Inc., 538 F.3d 926 (8th Cir. 2008) 27

Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287 (11th Cir. 2007).....15, 16

Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001) 24, 27

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).....*passim*

Burlington Northern & Santa Fe Railway v. White, 548 U.S. 53 (2006) 11, 13, 14, 18

Chaloult v. Interstate Brands, 540 F.3d 64 (1st Cir. 2008).....32

Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2nd Cir. 1998).....32

Farragher v. City of Boca Raton, 524 U.S. 775 (1998).....*passim*

Finnerty v. William H. Sadlier, Inc., 176 Fed. Appx. 158 (2nd Cir. 2006).....25

Harper v. City of Jackson Municipal School Dist., 149 Fed. Appx. 295 (5th Cir. 2005).....27

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).....11, 13, 14, 17, 18

Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003) 27

Leopold v. Baccarat, 239 F.3d 243 (2nd Cir. 2001).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Madray v. Publix Supermarkets, Inc., 208 F.3d 1290 (11th Cir. 2000) 27

McPherson v. City of Waukegan, 379 F.3d 430 (7th Cir. 2004) 27

Monteagudo v. AEELA, 554 F.3d 164 (1st Cir. 2009) ..... *passim*

Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998) ..... *passim*

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) ..... *passim*

Pinkerton v. Colorado Dept. of Transportation, 563 F.3d 1052 (10th Cir. 2009) 27

Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27 (1st Cir. 2003), *en banc reh'g denied*, 337 F.3d 1 (2003) 13, 14, 15, 16, 26

Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003) 16, 26

Shaw v. Autozone, 180 F.3d 806 (7th Cir. 1999) 27

Stofsky v. Pawling Cent. School Dist., 2009 WL 804085, Slip Opinion at 18 (S.D.N.Y. 2009) 25

Terwilliger v. Greyhound Lines, Inc., 822 F.2d 1033 (6th Cir. 1989) 27

Thornton v. Federal Express Corporation, 530 F.3d 451 (6th Cir. 2008) 27

Unitherm Food Systems v. Swift-Eckrich, Inc., 546 U.S. 394 (2006) 17

TABLE OF AUTHORITIES – Continued

Page

Walton v. Johnson & Johnson Svs., Inc., 347 F.3d 1272 (11th Cir. 2003) 28

Weger v. City of Ladue, 530 F.3d 710 (8th Cir. 2007) 15, 28

Wildman v. Verizon Corp., 2009 WL 104196, Slip Opinion at 4 (N.D.N.Y. 2009) 25

Wyatt v. Hunt Plywood Co., 297 F.3d 405 (5th Cir. 2002) 28

STATUTES

Title VII of the Civil Rights Act of 1964 ..... 1, 8, 22

RULES

Fed. R. Civ. P. 50(b) 8, 16

Sup. Ct. R. 10 ..... 2, 31

Sup. Ct. R. 15.1 1

Sup. Ct. R. 15.2 ..... 1, 16, 23, 31

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Michelle Monteagudo ("Monteagudo" or "petitioner"), presents this non-mandatory opposition to the pending Petition for a Writ of Certiorari ("Petition" or "Pet.") to place the case before this Court in its proper perspective. The petitioner, Asociacion de Empleados del Estado Libre Asociado de Puerto Rico ("AEELA" or "petitioner"), attempts to overturn a well reasoned opinion of the First Circuit, proposing that there was no evidence for the jury's finding that Monteagudo was reasonable in not using its complaint procedure for sexual harassment claims.

Unfortunately, AEELA has failed to be fully candid and even attempts to mislead this Court in its final effort to vacate the jury verdict pursuant to which the district court's judgment was entered and subsequently affirmed by the First Circuit. *See*, Sup. Ct. R. 15.1 and 15.2. The jury found that Monteagudo was sexually harassed by a supervisor and constructively discharged from her employment as a result thereof in violation of Title VII of the Civil Rights Act of 1964 and Puerto Rico Anti Discrimination Statutes. A-601, Questions No. 1 and No. 4.

Contrary to petitioner's contentions, Monteagudo will establish that the Petition is premised on a non-existent conflict between circuits and built on a

factual foundation foreign to the jury determinations and the evidence presented at trial.[1]

Essentially, AEELA's Petition constitutes a hollow attack on the First Circuit's consonant interpretation in the decision below of this Court's decisions in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). This is another run of the mill case consistent with the teachings of this Court and, certainly, not a case of national significance, except for AEELA, that would warrant intervention by this Court.[2] Accordingly, there are no "compelling reasons" for the Petition to be granted. *See*, Sup. Ct. R. 10.

---

[1] Petitioner's reference to conflicts in testimony at this stage can only be understood as intended to avoid the consequences of the evidence admitted without any objection or challenge by its counsel at trial and by which it is bound in the instant proceedings. *See e.g.*, Petition at p. 4, n. 1 ("Respondent testified that Vargas and a co-worker named Marilyn Del Valle ("Del Valle") witnessed the incident in the parking lot. They both testified that they never witnessed any inappropriate conduct.") (Del Valle was the Human Resources Director's mistress and both of them were present when Monteagudo rejected the harassing supervisor's attempt to kiss her against her will.) A-953-954; 917-919; p. 7, ¶ 3 ("alleged incident in the parking lot . . . "); p. 18, n. 6 ("who allegedly was complicit in Arce's harassment"); *see also, Monteagudo v. AEELA*, 554 F.3d 164, 172, n. 7 (1st Cir. 2009).

[2] AEELA's alarm at the effect that the decision below will have of "fundamentally reworking the balance the Court struck in *Ellerth* and *Faragher*" is completely unfounded. Pet. at p. 3. For instance, a Westlaw search under "Monteagudo /5 Asociacion" reveals three (3) instances since the judgment date

(Continued on following page)

STATEMENT OF THE CASE

Monteagudo worked for AEELA until December 5, 2002. Appendix on Appeal ("A-") 968. The jury found that on that date, she was "constructively discharged from her employment . . . specifically as a consequence of sexual harassment." Addendum on Appeal (hereafter "Add.") at p. 1, Question No. 1; A-601. From the summer of 2002 until December 5, 2002 Monteagudo was a permanent Secretary at AEELA's Human Resources Department. A-936-938. The Director of that Department and her immediate supervisor was Orlando Vargas ("Vargas"). A-799.[3] As Human Resources Director, Vargas was entrusted with enforcement of AEELA's anti-sexual harassment

---

of January 26, 2009. *None* dealt with the second prong of the affirmative defense and the alleged inevitable "reworking of the balance" which AEELA requests this Court to address. The contrast between AEELA's assessment of the impact of the decision below to the *Ellerth/Faragher* doctrine becomes evident when compared to the fifty (50) decisions elicited through a Westlaw search under "Ellerth /3 Faragher" that have dealt with this issue after the January 26, 2009 judgment by the First Circuit. As will be elaborated below, the scarce citations to *Monteagudo* in the last six months reflects the courts' clear appreciation of the factual nature of this case as well as a more accurate reading of the decision below in light of *Ellerth* and *Faragher* than AEELA is willing to concede.

[3] Pablo Crespo, his friend and Executive Director of AEELA, had recommended Vargas as the candidate for the Human Resources Directorship to AEELA's Board of Directors. A-798-799. The trial evidence demonstrated that they had known each other since 1990 or 1991, when both met at work at the Puerto Rico Senate. A-797.

policy. A-156. According to the policy, in the event that the harasser was the Human Resources Director or someone close to him, the employee was to lodge any complaint with the Executive Director. *Id.*

The Human Resources Department at AEELA in which most of the relevant events took place was about the size of the courtroom in which the instant case was tried. Supplemental Appendix on Appeal ("SA") 11. In addition to Vargas and Monteagudo, two other employees of the Human Resources Department testified at trial: Juan Francisco Arce ("Arce") and Marilyn Del Valle ("Del Valle"). Arce was a mid-level supervisor and the individual who sexually harassed Monteagudo. A-908; 917-919; 927-928. He was married and approximately twice Monteagudo's age. A-931, 1043. Arce, Vargas and the Executive Director at the time, Pablo Crespo ("Crespo") were friends and would go out for drinks together. A-798-800; 954-955; 976.

Del Valle was a Secretary at the Training and Scholarship Division of the Human Resources Department. A-906. Del Valle was a friend of Monteagudo and often went out together. A-907. At all relevant times, Del Valle was having an affair with Vargas. A-950-951. He was also married. A-1004-1005. On several occasions, Del Valle asked Monteagudo to go out with Arce so that she would be with Vargas and the four could "double date." A-965. Arce also made repeated invitations to Monteagudo for these "double dates" despite her regular refusals. A-961.

From the summer of 2002 until December 5, 2002, Monteagudo was sexually harassed by Arce, with the knowledge and *imprimatur* of AEELA, through Vargas, its Human Resources Director. A-810; 911. While Vargas was primarily entrusted with enforcement of the anti-sexual harassment policy, he did not report this harassment to his friend and the Executive Director, Pablo Crespo, as required in section 3.3 of the policy. A-156. Del Valle and José Figueroa ("Figueroa"), the employees who testified as to the harassment, did not report it either. A-911; SA-13. Crespo, the Executive Director admitted that the obligation to report harassment applied to all employees, including Vargas. A-810.

Figueroa was a messenger, who would make daily visits to AEELA's Headquarters to distribute correspondence. SA-6. On one occasion, while doing his rounds, he saw Arce put his hand on Monteagudo's waist and observed her reaction in trying to dodge his advance. SA-10. This occurred at Monteagudo's work station. Later, she explained to Figueroa that Arce "would always try to seek a way so he could touch her." SA-12. Figueroa commented to Monteagudo that he believed that her chances of solving her problem within AEELA were slim because it was something "extremely difficult and delicate" . . . because it "dealt with Mr. Orlando Vargas and Mr. Arce." SA-19.

Although Del Valle witnessed the incident at the parking lot of the local pub where Arce forcefully tried to kiss Monteagudo and she refused, Del Valle did not

report the same. A-914. Del Valle also declared that she saw Arce at Monteagudo's workstation on a daily basis. A-924. To questions by AEELA's counsel, Figueroa explained that he feared Vargas and, therefore, did not report what he knew, because Vargas had threatened him with discharge on a previous occasion. SA-28.

After Monteagudo's rejection of Arce's attempt to kiss her in front of Vargas and Del Valle, Vargas retaliated against her. As a result, Monteagudo's working conditions rapidly deteriorated. Vargas and Arce assigned her an onerous amount of additional work. A-967. Shortly thereafter, Vargas slammed his fist on the table and threatened Monteagudo with discharge if she dared file a complaint with the union because of the substantial increase in her workload. A-966-967. In addition to this threat and to the assignment of extra duties, Vargas sidelined Monteagudo and would not allow any co-workers to come to Monteagudo's work station, even if just to greet her. A-967-968. If Del Valle defied his instructions, he would scold her. A-968. After Monteagudo's rejection of Arce's attempt to kiss her, anything she performed at work was negatively criticized by Vargas. A-969. The tension at work increased to such an extent that Monteagudo would go home crying every day, could not sleep well, and reached a point where she did not have the will to report to work. A-962.

Monteagudo's working conditions became intolerable. A-966-969; A-601, Question No. 1. Like Figueroa,

Monteagudo had a legitimate fear that the reporting mechanism would not be effective in light of the high ranking officials involved. A-975-977; SA-13; 19. Although, Section 3.2 of AEELA's sexual harassment policy designated the Human Resources Director and the Executive Director as the officials designated for reporting sexual harassment at AEELA, A-156, Monteagudo knew that Vargas and Crespo were friends of her harasser.[4] Since Vargas was an active participant in the harassment, Crespo was Monteagudo's "impartial" channel under AEELA's policy to present her complaint against his friends. A-156.

Less than two weeks after Arce's failed attempt to kiss her and the ensuing retaliation by Vargas, Monteagudo became convinced that she had no other alternative but to resign. She did not use the reporting mechanism provided by AEELA and explained at trial that she resigned because her "fear was that *they would take reprisals like they had done before* simply because [she] did not want to be with" Arce. A-1002-1003 (emphasis supplied).

On May 29, 2007 the jury found for Monteagudo on all aspects of her claims of sexual harassment and constructive discharge in violation of Title VII of the

---

[4] AEELA's attempt to object to the quality of the evidence of friendship between Crespo, Arce and Vargas before this Court is untimely and unwarranted. After all, it was AEELA's counsel who elicited this information at trial and never objected as to its admissibility. A-976.

Civil Rights Act of 1964 and Puerto Rico Anti Discrimination Statutes.[5] AEELA proved the first element of the *Ellerth/Faragher* affirmative defense, but failed on the second because the jury found that Monteagudo was reasonable in not invoking the reporting mechanism provided by AEELA. Judgment and Judgment *Nunc Pro Tunc* were entered on June 1, 2007. Add.-3; 5.

From all the evidence presented, including proof of retaliation and intolerable work conditions leading to Monteagudo's constructive discharge, the jury found that she had a credible fear of futility and retaliation and was, therefore, reasonable in not invoking the complaint mechanism provided in AEELA's sexual harassment policy. A-601, Question No. 3. After the verdict, AEELA renewed its Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50(b) and presented a Motion for New Trial and/or *Remittitur*. A-639-643. The district court denied both motions. A-780-783; 619-621.

AEELA filed a timely notice of appeal and an amended notice of appeal. A-785-786; 790-791. Judgment was entered January 26, 2009, affirming the jury verdict and the district court judgment in all respects. Petitioner's Appendix ("Pet. App.")-1a-32a.

---

[5] The local law portion of the judgment has not been challenged by AEELA.

In its opinion, the First Circuit analyzed the reasonability of Monteagudo in failing to invoke AEELA's reporting mechanism. In the process it identified several factors that were evaluated. These factors were:

(1) the friendship between Arce and Vargas; (2) the friendship between Arce, Vargas and Crespo; (3) Figueroa's bleak assessment on Monteagudo's odds of resolving her predicament within AEELA because of the high level officials involved; (4) Vargas' substantial increase in Monteagudo's workload; (5) Vargas' threat of dismissal if Monteagudo used the union grievance mechanism;[6] (6) Vargas' ostracizing of Monteagudo after her rejection of Arce's sexual advances; (7) the failure of the witnesses to the harassment to report it as required by the policy; (8) Vargas' threat of discharge against Figueroa prior to the Monteagudo situation; and (9) the impact of the age differential between Monteagudo and Arce. The panel[7] concluded that Monteagudo was reasonable in bypassing AEELA's complaint procedure because she had "more than the ordinary fear or embarrassment." *Monteagudo*, 554 F.3d at 172.

---

[6] This is a factual scenario remarkably analogous to the one presented to the jury for determination as to the second element of the *Ellerth/Faragher* affirmative defense.

[7] Judge Baldock from the Tenth Circuit sat by designation, together with Judges Torruella and Howard from the First Circuit.

Petitioner's timely request for rehearing and suggestion that rehearing be *en banc* were denied on February 20, 2009. Pet. App.-33a.

On May 21, 2009, the instant petition for writ of certiorari was presented predicated on Monteagudo's alleged unsupported subjective fear of retaliation and futility. The Petition was docketed (08-1454) on May 26, 2009. Monteagudo was afforded an extension of time until July 27, 2009 to file the instant Response in Opposition.

REASONS FOR DENYING THE PETITION FOR WRIT

The Petition intentionally misrepresents the First Circuit's position on the only issue before this Court: the evidence required for an employee to be reasonable in failing to invoke an employer's sexual harassment complaint mechanism. According to AEELA, the First Circuit has made use of the reporting mechanism "essentially voluntary." Pet. 3. Only in this fashion can petitioner articulate an ostensibly meritorious basis for its request to this Court. To further its cause it has flown the banner of Monteagudo's alleged "unsupported subjective belief" and the lack of a "credible fear of retaliation." Pet. 15, 21. In its effort AEELA has made a fatal mistake: it chose to disregard, as if allowed, the evidentiary foundation upon which the jury reached its determination that AEELA had failed its burden of

proving the second element of the *Ellerth/Faragher* affirmative defense. Moreover, it ignored the several factors identified by the First Circuit upon which the jury predicated its findings. What petitioner seeks before this Court is review of a fact-bound case with limited consequences for subsequent decisions in which the objective reasonability of an employee's decision to bypass the employer's complaint procedure may be at stake. To destroy the basis of the First Circuit's consonant application of this Court's guidelines in *Ellerth/Faragher*, AEELA has used a "compartmentalized factor analysis" incompatible with the "totality of the circumstances" approach adopted by this Court. *See, Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

In its wisdom, this Court provided a framework to address employer vicarious liability for sexual harassment by supervisors where no tangible employment action results. In those situations, the employer could escape liability by proving the two elements of the *Ellerth/Faragher* affirmative defense. First, that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and second, that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. 765; *Faragher*, 524 U.S. at 807.

The second element represents an acknowledgement by this Court that there are circumstances, as in this case, in which an employee may forego the use of the established reporting procedure. The jury's unfavorable finding at trial constitutes a straightjacket for AEELA. To reach its determination, the jury considered the several reasons presented by Monteagudo for not using AEELA's reporting mechanism. 554 F.3d at p. 172. But, as in any other affirmative defense, the employer retained the burden of persuasion on both elements.

Because of AEELA's failure to prove this second element at trial, it has chosen an alarmist approach to captivate the attention of this Court. It also explains the Petition's repeated conclusory and misleading assertions that Monteagudo based her decision to ignore AEELA's complaint mechanism on an "unsupported subjective belief." Contrary to the summary judgment opinions upon which AEELA relies, the record in this case contains instances of actual (*i.e.*, assignment of excessive work) as well as threats against Monteagudo by AEELA's Human Resources Director of future retaliation if she used the union grievance procedure. A-967. To press its point AEELA would have this Court adopt a posture requiring not a *credible* fear but evidentiary *certainty* of futility and of retaliation for a harassed employee to be objectively reasonable in not using the established procedures and indeed chastises the First Circuit for not requiring "objective evidence of *actual* futility." Pet. 15 (emphasis ours).

To advance its position AEELA relies on two principal sources: (1) *Leopold v. Baccarat*, 239 F.3d 243 (2nd Cir. 2001); and (2) Monteagudo's isolated failure to turn to Crespo, while ignoring the "totality of the circumstances" analysis often reiterated by this Court to determine "objective reasonability." *See e.g., Burlington Northern & Santa Fe Railway Co.*, 548 U.S. at 69; *Suders,* 542 U.S. at 141; *Oncale,* 523 U.S. at 81-82 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. at 23.

A serious reading of the First Circuit's *reported* decision explaining the panel opinion while denying the petition for rehearing *en banc* in *Reed v. MBNA Marketing Systems, Inc.*, 337 F.3d 1 (1st Cir. 2003) and of the First Circuit's decision below in *Monteagudo*, should have provided AEELA sufficient cause to pause and reconsider the merits of its arguments before presenting them to this Court.[8]

---

[8] The Petition's weakness is partly evidenced by its undue reliance and the forced characterization of the "objective reasonability" issue as a discrete issue of law, when it is a factually based "totality of the circumstances" inquiry proper for jury determination. *See e.g., Oncale*, 523 U.S. at 81-82; *Reed*, 333 F.3d at 37.

I. The Decision Below Does Not Create A Conflict Between The Circuits On What Constitutes Objective Reasonability For An Employee To Bypass A Valid Complaint Procedure.

The instant Petition should be denied because the First Circuit's decisions in *Reed* and *Monteagudo* correctly incorporate the tenets established by this Court to determine when an employee acts in an objectively reasonable manner. *See*, *Oncale*, 523 U.S. at 81-82; *Burlington Northern & Santa Fe Railway Co.*, 548 U.S. at 69; *Harris*, 510 U.S. at 23; *Suders*, 542 U.S. at 141.

Notwithstanding, AEELA clearly overstates its case when it charges the First Circuit with making "the employee's use of a valid complaint procedure essentially voluntary . . . " Pet. 3, through the alleged evisceration of "the careful balance this Court struck in *Ellerth* and *Faragher*" and the creation of "a clear circuit conflict" as to the nature of the evidence required for a plaintiff to be entitled to a finding that she reasonably failed to invoke the complaint procedure provided by the employer. Pet. 11.

The "clear circuit conflict" alluded to in the Petition, essentially circumscribed to and allegedly created by the First Circuit's opinions in *Reed* and *Monteagudo*, is a fabrication by AEELA to avoid the consequences of the judgment entered in favor of Monteagudo. Add.-3-5. To obtain review by this Court AEELA pretends to substitute its interpretation of

the appellate decision in *Reed* by that of the First Circuit in which the court sitting *en banc* explained that the panel decision:

> . . . makes it *clear* that a complainant *cannot bypass an adequate complaint procedure if the failure to do so was "objectively unreasonable for one in the [complainant's] position."* *Op.* at p. 37. See also op. at 37 ("Or, the jury might conclude that whatever Reed's state of mind, a reasonable person in her position would have reported Appel's assault.")
>
> The opinion also contemplated that Reed could not excuse a failure to use the complaint process based on threats of retaliation and Appel's purported family influence if "in fact" Reed was not persuaded by these threats and therefore the threats were not a cause of the failure to use the complaint process. *Op.* at 37. See also op. at 37. *But this does not eliminate the objective test for reasonableness and serves only to give additional protection to a defendant.*

Reed, 337 F.3d at 1 (emphasis supplied).[9]

---

[9] The Petition unequivocally asserts that the decision in *Monteagudo* "resolved any ambiguity in *Reed*, and is now plain that the First Circuit does not require the concrete, objective evidence required by most circuits." Pet. 22, n. 8. This is ludicrous since AEELA relies on decisions that cite *Reed* for the exact proposition for which AEELA contends that the First Circuit does not stand. *See e.g., Weger v. City of Ladue*, 530 F.3d 710, 725 (8th Cir. 2007); *compare* Pet. 14, 16, 19 and 21; *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1307

(Continued on following page)

Unmistakably, the First Circuit in *Reed* reiterated the applicable test and the intention of this Court in its holdings in *Faragher* and *Ellerth*.[10] A careful review of the decision below reveals that the First Circuit has faithfully applied the holdings of those decisions given the totality of the established facts and reasonable inferences drawn from the proof admitted at trial.[11]

(11th Cir. 2007) *compare* Pet. 12, 27, 29 and 32. AEELA's blatant failure to be candid and accurate before this Court is exemplified by its citation to a passage of *Baldwin* at page 1307. Pet. 29. AEELA uses that passage to attack the First Circuit's alleged permissiveness for employees not to invoke the employer's reporting mechanism based on "subjective fears of retaliation . . . " In so doing, AEELA omits the citation to *Reed* contained in the cited passage of *Baldwin* it propounds to this Court; does not apprise this Court of the citation omitted; but also deleted the transitional phrase in the original for its proposition, to wit: **"As the First Circuit has explained."** *See* Sup. Ct. R. 15.2. This style of advocacy is, at best, completely unwarranted.

[10] Indeed, this Court recognized in *Pennsylvania State Police v. Suders*, 542 U.S. at 141 (2004) that: "The courts in *Reed* [1st Circuit] and *Robinson* [7th Circuit] properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, *mark the path constructive discharge claims based on harassing conduct must follow.*" *Suders,* 542 U.S. at p. 150 (emphasis ours).

[11] Monteagudo is aware of the First Circuit's statement that her evidence was "not overwhelming" but still sufficient for a reasonable jury to find in her favor. After all, this case is before this Court on a denial of AEELA's Fed. R. Civ. P. 50(b) and the First Circuit's statement as to the sufficiency of the evidence presented and of the applicable standard is accurate. *See e.g.,*

(Continued on following page)

It should be noted that every decision cited and discussed by AEELA in support of its Petition is distinguishable from the district court's decision and the First Circuit's in an important respect: the jury's finding that Monteagudo was "constructively discharged from her employment at AEELA specifically as a consequence of sexual harassment," a finding which AEELA fails to even mention in its entire Petition. A-601, Question No. 1. The evidence underlying this finding was also relevant to the First Circuit's determination as to whether a reasonable jury could conclude that Monteagudo could bypass the complaint procedure under the facts of her case. *See, Monteagudo*, 554 F.3d at 168-169 and n. 4. AEELA does not address it in the Petition.

Two corollaries from the jury's first finding remain unchallenged by AEELA: (1) that she was submitted to sexual harassment so pervasive and severe that it altered her working conditions; and (2) that "the abusive working environment became so intolerable that her resignation qualified as a fitting response. Monteagudo met both objective standards. *Harris*, 510 U.S. at p. 21; *Suders*, 542 U.S. at p. 141. Yet, AEELA does not mention to this Court that the jury was not only permitted but required to consider the totality of the circumstances established by the trial evidence, including that supporting the findings

---

Unitherm Food Systems v. Swift-Eckrich, Inc., 546 U.S. 394, 402 (2006).

of sexual harassment and subjection to intolerable working conditions, to determine if she had an "objectively reasonable fear of retaliation" to excuse her resort to the employer's procedure to complain. *See, Harris*, 510 U.S. at 23; *Oncale*, 523 U.S. at 81; *Burlington Northern & Santa Fe Railway Co.*, 548 U.S. at 69; *Suders*, 542 U.S. at 141.

Scrutiny of this "compartmentalized" vis-à-vis the "totality of the circumstances" approach serves to detect and highlight for this Court the dubious foundation upon which the Petition has been constructed.[12] First, AEELA omits any reference to the finding that Monteagudo was the victim of a sexually based constructive discharge. Second, AEELA addresses, in complete isolation, the various

---

[12] As part of its attack, AEELA claims that the First Circuit in the opinion below failed to give "legal content to this Court's 'reasonableness' requirement," and mocks the court's reference to the juries' role in this endeavor because they "are supposed to be good at . . . evaluating reasonable behavior in human situations, . . . " Pet. 21. Again, AEELA's posture is untenable. For instance, in *Oncale*, this Court recognized:

> The real social impact of workplace behavior often depends on a *constellation of surrounding circumstances, expectations, and relationships* which are not fully captured by a simple recitation of the words used or the physical acts performed. *Common sense and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.*

Oncale, 523 U.S. at 81-82 (emphasis ours).

reasonability factors established by the evidence at trial and considered by the jury, the district court and analyzed in the opinion below by the First Circuit. Based on the evidence at trial, AEELA cannot establish Monteagudo's unreasonableness if the entire "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed" is analyzed. *Oncale*, 523 U.S. at 82.

In the opinion below, the First Circuit engaged in the required inquiry and identified several factors and ascribed to them different degrees of importance. 554 F.3d at 172. These factors were: (1) the friendship between Arce and Vargas; (2) the friendship between Arce, Vargas and Crespo; (3) Figueroa's bleak assessment on Monteagudo's odds of resolving her predicament within AEELA because of the high level officials involved; (4) Vargas' substantial increase in Monteagudo's workload on the next working day after her rejection of Arce's sexual advances; (5) Vargas' threat of dismissal if Monteagudo used the union grievance mechanism to question the additional workload; (6) Vargas' ostracizing of Monteagudo after her rejection of Arce's sexual advances; (7) the failure of the witnesses to report the harassment as required by the policy; (8) Vargas' threat of discharge to Figueroa prior to the Monteagudo situation; and (9) the impact of the age differential between Monteagudo and Arce. Now, let us discuss why in light of this evidence AEELA's Petition should be denied.

AEELA rests its chances of review on Monteagudo's alleged unsupported fear of retaliation by Crespo if she had gone directly to him and reported Arce's harassment. Pet. 16-17. The evidence admitted establishes that this is incorrect. It is not surprising that the First Circuit points out that Monteagudo was "understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas' relationship with Arce." 554 F.3d at 172. But the court immediately acknowledged that the "more difficult question, however, was whether Monteagudo's failure to report Arce's conduct to Crespo was unreasonable on the basis of Crespo's alleged[13] friendship with Arce and Vargas." *Id.*

Before reaching its conclusion that Monteagudo was reasonable in not reporting the harassment to AEELA, including directly to Crespo, the First Circuit engaged in the mandatory analysis required by this Court and analyzed the other evidence that had to be factored in to reach its conclusion. Because the First Circuit considered the interrelation between all of the factual components for the inquiry before it, the court was justified in concluding that "while Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could find in her favor because her failure to report the harassment was based on 'more than ordinary fear or embarrassment'

---

[13] After the jury verdict, the friendship between Arce, Vargas and Crespo was no longer "alleged" but a *fait accompli* established by the trial evidence.

and was therefore reasonable." 554 F.3d at 172. This analysis and its conclusion are completely consistent with this Court's decisions in *Ellerth* and *Faragher*.

To create its "conflict on the Petition's paper," AEELA substantially relies on *Leopold v. Baccarat*, 239 F.3d 243 (2nd Cir. 2001) and its contrast with the First Circuit's position that the *only manner* for an employee to establish a *credible fear* of retaliation is *not* by producing evidence "to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints." *Id.* at 246. AEELA's myopic interpretation of *Leopold* is discredited by the Second Circuit in the same decision where the court explained that:

> Once an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the *burden of production* shifts to the employee to come forward with *one or more reasons* why the employee did not make use of the procedures. The employer may rely upon the *absence or inadequacy* of such justification in carrying its ultimate burden of persuasion.

Id. (emphasis supplied).

The reference in *Leopold* to the "absence or inadequacy of such justification" is important to understand *Leopold* and the reasons why it is not in conflict with the First Circuit. Contrary to Monteagudo's evidentiary showing in this case, the

plaintiff in *Leopold* offered "nothing from the extensive record in [the] case to substantiate her fears." *Id.* (emphasis ours). Had AEELA sought to have the jury charged under *Leopold*, the jury finding would not have necessarily been different.

Furthermore, the existence of *Leopold* at the time of trial in this case, coupled with AEELA's failure to request an instruction under it, constitutes tacit recognition on its part that the Second Circuit did not intend its decision to be as restrictive as AEELA portrays it to be throughout its Petition. Otherwise, an employee who reasonably failed to report harassment *before the procedure had ever been tested* would be automatically deprived of the protection afforded by Title VII. Such result would be required not under the Second Circuit's but only under AEELA's self-serving interpretation of *Leopold* that actual evidence of retaliation is the only avenue for an employee to have a credible fear and therefore be allowed to obviate use of the reporting mechanism. It would also be absurd.[14]

---

[14] The evidence of proof of effectiveness of the policy which AEELA attempted to introduce at trial was for a complaint in 2005, that is, three years after the facts in this case. 554 F.3d at 173-174. Inevitably in 2002, Monteagudo would have been precluded from producing actual evidence of effectiveness of the policy if the first time that it was effectively used was three years later. Consequently, she would have been deprived of redress as a result thereof. This would have been an absurd result, indeed.

(Continued on following page)

Viewed in its full and proper context as one of the factors inherent to the reasonability inquiry, Monteagudo's failure to report Arce's harassment directly to Crespo was also reasonable under *Ellerth* and *Faragher*. The reasonability determination is buttressed by the evidence that Vargas, AEELA's Human Resources Director, was aware of the harassment by Arce and was also an active participant in the ensuing retaliation.

The language of AEELA's reporting mechanism in the anti-sexual harassment policy evinced an intention to provide an alternative and impartial avenue for victimized employees to report harassment if the Human Resources Director was either the harasser or was closely related to the harasser. A-156. This impartial avenue for reporting sexual harassment was AEELA's Executive Director. *Id.* The Executive Director is "the highest authority within [AEELA] . . . at the administrative level." A-795-796.

In this case, however, there was evidence elicited by AEELA that the individual holding the Executive

---

At this, juncture it is worth pointing out AEELA's misrepresentation to this Court to the effect that in allegedly rejecting the holding in *Leopold* the First Circuit went "so far as to uphold the exclusion of evidence of **past responsiveness**." Pet. 11 (emphasis supplied); Sup. Ct. R. 15.2. No proffer concerning the proposed admission of evidence of the policy's effectiveness before the harassment of Monteagudo was made at trial. Therefore, with the evidence proffered at trial, AEELA could not have established the **past responsiveness** under the policy upon which the Petition unduly relies.

Director position at the time of Monteagudo's harassment, *i.e.*, Crespo, was a friend of both, the harasser and of the Human Resources Director. A-976. Indeed, according to the policy, the only reason for a sexual harassment claim to be reported to the Executive Director would be because the Human Resources Director was either the harasser or someone close to him. Thus, the jury could take into consideration that in the specific circumstances of this case, the intention of the drafters of the policy was thwarted because the intended "alternative and impartial" avenue for reporting harassment was "contaminated" and may no longer have been "impartial" nor a real "alternative" for Monteagudo to report Arce's harassment.

But the jury's decision did not need to rest on that factor alone. Hence, this was another factor to be considered in the jury's determination that Monteagudo was reasonable in not reporting the harassment by Arce, including going directly to Crespo.[15] Accordingly, the First Circuit acknowledged that this was a "more difficult question" than the friendship between Arce and Vargas. 554 F.3d at 172. But in contrast with AEELA's position, the caselaw does not require

---

[15] In its Petition, AEELA predicates its attack on Crespo's friendship on the Fourth Circuit's decision in *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001). Unlike *Monteagudo*, the plaintiff in *Barrett* was found to have been unreasonable in not reporting harassment because she *exclusively* relied on the friendship between the harasser and the managers, including a former Vice-President. *Id.*

certainty of futility or retaliation but rather a "credible fear." *See e.g., Leopold*, 239 F.3d at 246.[16]

Also, *Leopold* is distinguishable in another important respect: Monteagudo was actually retaliated against by the Human Resources Director, using the authority of his office as such, and as a result of her rejection of his friend's unwelcome attempt to kiss her. In this respect *Leopold*, as well as every other case cited by AEELA in its Petition, is inapposite to this case.

Monteagudo produced evidence at trial from which a reasonable jury could find that she had the required "credible fear" of retaliation to justify her decision to forego use of the complaint procedure. She explained:

> And my fear was [that] they would *take reprisals like they had done before* simply because I did not want to be with someone from the Association.

A-1002 (emphasis supplied).

---

[16] Decisions subsequent to *Leopold* within the Second Circuit recognize that a plaintiff has the burden of producing evidence of one or more reasons "showing that his or her fear is 'credible,' *such as* proof 'that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints.'" *Finnerty v. William H. Sadlier, Inc.*, 176 Fed.Appx. 158 (2nd Cir. 2006) *citing Leopold*, 239 F.3d at 246 (emphasis ours); *see also, Stofsky v. Pawling Cent. School Dist.*, 2009 WL 804085, Slip Opinion at 18 (S.D.N.Y. 2009); *Wildman v. Verizon Corp.*, 2009 WL 104196, Slip Opinion at 4 (N.D.N.Y. 2009).

The retaliation she referred to was that stemming from her rejection of Arce's attempt to kiss her in the presence of Vargas, his friend and Human Resources Director. The evidence established that Vargas became the "retaliating supervisor."[17] Before engaging in any retaliation, Vargas had been a drinking buddy of Arce; a "silent partner" in his harassment of Monteagudo; and one of the four who would have gone on double dates, if Monteagudo had yielded to their pressure. A-961. Monteagudo produced evidence of the reasons for her decision not to invoke AEELA's complaint procedure. These reasons provided the basis for the jury, the district court and the First Circuit to conclude that she was reasonable in not reporting the harassment to AEELA. In direct contrast to her, the employee in *Leopold* offered "nothing from the extensive record in th[e] case to substantiate [her] fears." 239 F.3d at 246 (emphasis supplied). In sharp contrast to

---

[17] No such figure or equivalent exists in any of the cases cited by AEELA in its Petition. This Court in *Suders*, however, discussed the First Circuit's decision in *Reed* and *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003).

Although *Robinson* involved a tangible employment action constructive discharge, the facts there are almost identical to this case. In *Robinson* the harassing supervisor's supervisor was the one whom, using the power of his office as "presiding judge," provided the "official act" that gave rise to the tangible employment action. In this sense, this case has a closer resemblance to the tangible employment action constructive discharge in *Robinson* than the non-tangible employment action involved in *Reed*. Here, Vargas was the equivalent of the "presiding judge" in *Robinson*.

Monteagudo, most of the employees in the cases upon which the Petition relies failed to offer any proof to substantiate their fears and thus their actions were dismissed as a matter of law before going to trial. Yet, AEELA loosely equates Monteagudo to the other plaintiffs whom their respective courts found that dismissal of their actions was warranted in light of the unsupported and subjective fears of futility or retaliation.[18]

---

[18] The production of evidence by Monteagudo as to the reasonability of her actions in failing to use AEELA's procedure explains petitioner's failure to request an instruction under *Leopold*, which had been decided six years before this case went to trial or most of the cases cited in support of this proposition in its Petition: *Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 932 (8th Cir. 2008) (Adams "offers no evidence to show that the fear was either genuine or reasonable.") *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001) (only evidence of friendship between managers was presented); *Harper v. City of Jackson Municipal School Dist.*, 149 Fed. Appx. 295, 302 (5th Cir. 2005) ("Harper failed to substantiate her fears."); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003) ("Holly D. has presented no evidence to indicate that a different conclusion would be appropriate here."); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000); *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004); *Pinkerton v. Colorado Dept. of Transportation*, 563 F.3d 1052, 1063 (10th Cir. 2009) (Ms. Pinkerton never offered any reason in her briefs . . . only expressed a "fear that Mr. Martínez would retaliate against her."); *Shaw v. Autozone*, 180 F.3d 806, 813 (7th Cir. 1999) ("she did not feel comfortable enough . . . "); *Terwilliger v. Greyhound Lines, Inc.*, 822 F.2d 1033 (6th Cir. 1989); *Thornton v. Federal Express Corporation*, 530 F.3d 451, 457 (6th Cir. 2008) ("Plaintiff has not adduced evidence demonstrating that she was under a 'credible threat of retaliation.'");

(Continued on following page)

Another factor identified by the First Circuit and attacked as improper by AEELA is the court's consideration of the age differential between Monteagudo and her harasser. In its desperation, AEELA goes as far as claiming that the consideration of this factor by the First Circuit constitutes another independent "conflict" to justify this Court's intervention. Pet. 23-24. AEELA does not, however, point to any limitation by this Court or any other to afford "at least some relevance" to the age differential or any other factor as part of the required "totality of the circumstances" analysis. The jury and the district court were able to see the demeanor of the harasser and of the harassed, were inevitably aware of the age difference, heard their testimony and may have taken it into consideration as part of the decision-making process leading to the finding that Monteagudo was reasonable in not invoking the complaint procedure. *See, Oncale*, 523 U.S. at 81-82.

Of the factors identified by the First Circuit to conclude that Monteagudo had a credible fear of retaliation, AEELA only addresses those related to its reliance on *Leopold* and the age differential. The other factors serve to provide the pieces for the jigsaw puzzle of the "totality of the circumstances" establishing

---

Walton v. Johnson & Johnson Svs., Inc., 347 F.3d 1272 (11th Cir. 2003); *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) ("record is devoid of any threat of retaliation" and thus "Plaintiffs fear of retaliation is not credible . . . "); *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405 (5th Cir. 2002).

Monteagudo's objective reasonableness. These included: (1) Figueroa's bleak assessment on Monteagudo's odds of resolving her predicament within AEELA because of the high level officials involved;[19] SA-19; (2) Vargas' substantial increase in Monteagudo's workload on the next working day after her rejection of Arce's sexual advances; (3) Vargas' threat of dismissal if Monteagudo used the union grievance mechanism to question the additional workload; (4) Vargas' ostracizing of Monteagudo after her rejection of Arce's sexual advances; (5) the failure of the witnesses to report the harassment as required by the policy; and (6) Vargas' threat of discharge to Figueroa prior to the Monteagudo situation; and (7) the impact of the age differential between Monteagudo and Arce.

This evidence supported that the jury's findings of hostile work environment sexual harassment; constructive discharge; and Monteagudo's objectively reasonable decision not to avail herself of the complaint procedure are all internally consistent. Even when analyzed together with the finding that AEELA had "approved an anti-sexual harassment policy which provided the procedure for employees to channel their claims and that the policy was disseminated among the employees . . . " the consistency is not lost. A-601, Question No. 2.

---

[19] Vargas had also threatened Figueroa with discharge on an unrelated incident prior to the situation with Monteagudo. SA-28. Thus, the jury could take this evidence into consideration to evaluate how upper management handled employee concerns.

II. This Case Is An Inappropriate Vehicle To Address The Question Presented Even If Guidance Were Necessary

It should be clear by now that the case portrayed by AEELA is not the appropriate vehicle for guidance on the question it presents because it is different in important respects to the one adjudicated by the jury, the district court and the First Circuit.[20] The case under consideration does not warrant any further review from this Court because the applicable standard was followed and the case was correctly decided on the evidence admitted at trial.

In order to make of this case an "ideal vehicle," AEELA has grossly misrepresented the import of the First Circuit's decisions to this Court. *See,* n. 12, above. Additionally, it has referred to crucial evidence in a manner that deprives it of its importance to the merits of the instant Petition. For instance, in the context of sexual harassment, the difference between harassment by a co-worker or by a supervisor has tremendous impact on the contours of the inquiry and the availability of, among others, the *Ellerth/Faragher* affirmative defense. If the harasser happens to be a supervisor, as in this case, the nature of his actions are essential to the determination of whether a

---

[20] Monteagudo respectfully submits that, based on the procedural history of this case, her formulation of the question presented is more accurate than petitioner's and depicts the lack of compelling reasons to issue the requested writ.

constructive discharge constitutes a tangible employment action or not. *Suders*, 542 U.S. at 148.[21]

If the Human Resources Director is aware of and is an active participant in harassment, the consequences for the employer are considerably more difficult to avoid. In the Petition, AEELA self-servingly refers to its Human Resources Director, at the precise moment when he is a witness to the last incident of sexual harassment, as a mere "co-worker." While it is correct that Vargas was a "co-worker" of Monteagudo because they both worked for AEELA, its choice of words unduly detract from the significance of the situation. Vargas was the supervisor of the "harassing supervisor" at the Human Resources Department and was primarily entrusted with enforcement of AEELA's anti-sexual harassment policy, including its complaint procedure. Compare A-961 and Pet. 4 (doctoring the record by closing quotation marks after "together" and substituting Del Valle and Vargas for "other coworkers").[22] Vargas' presence at

---

[21] Monteagudo did not pursue on appeal whether her constructive discharge constituted a tangible employment action although it was tantamount to one. *Monteagudo*, 554 F.3d 164, 171 at n. 6 (1st Cir. 2009). This does not mean, however, that the jury was precluded from assessing the evidence admitted at trial in its inquiry as to the objective reasonableness of her failure to invoke AEELA's complaint procedure.

[22] The wording selected by AEELA tends to hamper this Court's task of determining if "compelling reasons" exist to grant the Petition, regardless of whether this also constitutes a "misstatement of fact" under Sup. Ct. R. 15.2. *See*, Sup. Ct. R. 10. Also, the presence of Marilyn Del Valle at the parking lot

(Continued on following page)

the parking lot where Monteagudo rejected Arce's attempt to kiss her constituted knowledge of the sexual harassment by the employer. *See e.g., Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 63-64 (2nd Cir. 1998); *Chaloult v. Interstate Brands*, 540 F.3d 64, 75-76 (1st Cir. 2008) *citing, Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 422-23 (11th Cir. 1999) ("*Dees* concerned the adequacy of evidence that the harasser's *supervisors* had knowledge of the harassment and did nothing.") (Emphasis in original). Rather than reporting the harassment as he was required by AEELA's policy, Vargas commenced to pressure Monteagudo until she was constructively discharged. A-810.

Notwithstanding Vargas' presence at the parking lot incident, AEELA asserts before this Court that "Respondent did not mention the alleged harassment in the parking lot (or any other harassment) in this complaint to Vargas." Pet. 5 (emphasis supplied); *compare, Monteagudo*, 554 F.3d at 172, n. 7. The reason was obvious, Vargas was present at the time of the incident and knew of his responsibilities under the anti-sexual harassment policy. A-810; 911; 957. He

---

when Arce attempted to kiss Monteagudo, belies AEELA's statement in the Petition that the "only witness besides respondent to an incident of possible harassment was a fellow employee named José Francisco Figueroa-Cana." Pet. 4, n. 1 ("inappropriate conduct"); Pet. 5; *compare*, A-918-919; *see also, Monteagudo*, 554 F.3d at 172, n. 7.

did not fulfill any of them and the jury was aware of this.

The "ideal vehicle" for review cannot be manufactured through the distortion of the evidence admitted at trial and the reasonable inferences the jury was entitled to draw from it. That is the evidence that provides the factual background against which the Petition shall be considered. For purposes of the Petition, AEELA has gone to great lengths to avoid facing that it has to live with facts established such as that the "harassing" and the "retaliating" supervisors were friends and drinking buddies. A-917-919; 955-957. At trial, it was AEELA's counsel whom elicited the evidence to establish for the jury their friendship with the Executive Director, Pablo Crespo. A-976. Thus, the jury was entitled to conclude that the three were friends. Hence, the jury was at liberty to infer from the evidence before it that Monteagudo, like any other reasonable person in her position, to expect that friends in powerful positions tend to protect friends in sticky situations. It was reasonably foreseeable for Crespo to protect Arce and Vargas.[23] Certainly, the jury did not have to make this

---

[23] Notwithstanding that Crespo was a witness at trial, AEELA did not inquire as to the nature of his friendship with Vargas and Arce after Monteagudo established that he may have gone out for drinks with Vargas and/or Arce. However, Crespo testified that he knew Vargas from their previous employment at the Senate of Puerto Rico and that he was the one who recommended Vargas for the position of Director of Human Resources to AEELA's Board of Directors. App. 798-799.

inference to hold in favor of Monteagudo if it faithfully followed the application of the guidelines provided by this Court in *Ellerth* and *Faragher*.

Thus, the case of Monteagudo, the one grounded on the trial evidence and not the one favorably crafted by AEELA without regard to the jury's prerogative to examine the evidence and draw any reasonable inference from it, is the only one upon which the merits of the opinion below may be assessed. Monteagudo respectfully submits that it is not the "ideal vehicle" to warrant this Court's intervention and that no compelling reasons exist to issue the writ.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CARLOS M. VERGNE
24 Mariana Bracetti,
Second Floor
San Juan, PR 00925

JUAN RAFAEL GONZÁLEZ MUÑOZ
Counsel of Record
MARIA ELENA MARGARIDA-FRANCO
GONZÁLEZ MUÑOZ LAW OFFICE PSC
PMB 608
89 De Diego Ave., Suite 105
San Juan, PR 00927
(787) 766-5052

Counsel for Respondent

July 2009

Supreme Court, U.S.
FILED
AUG 5 - 2009
OFFICE OF THE CLERK

No. 08-1454

In the Supreme Court of the United States

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,
Petitioner,

v.

MICHELLE MONTEAGUDO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY FOR PETITIONER

PEDRO E. ORTIZ-ALVAREZ
JORGE MARTINEZ-LUCIANO
LAW OFFICES OF PEDRO ORTIZ-ALVAREZ, PSC
P.O. BOX 9009
SAN JUAN, PR 00732

PAUL D. CLEMENT
Counsel of Record
JEFFREY S. BUCHOLTZ
SARAH O. JORGENSEN
KING & SPALDING LLP
1700 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20006
(202) 737-0500

August 5, 2009

Attorneys for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY FOR PETITIONER 1

RESPONDENT CANNOT AVOID THE CLEAR CONFLICT CREATED BY THE DECISION BELOW OR THE NEED FOR THIS COURT'S REVIEW 3

CONCLUSION 12

TABLE OF AUTHORITIES

Barrett v. Applied Radiant Energy Corp.,
240 F.3d 262 (4th Cir. 2001) 5

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) ..... *passim*

Crawford v. Metropolitan Gov't of Nashville and Davidson County,
129 S.Ct. 846 (2009) 11

Deters v. Rock-Tenn Co.,
245 Fed. Appx. 516 (6th Cir. 2007) 5

Doe v. Oberweis Dairy,
456 F.3d 704 (7th Cir. 2006) 8

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) ..... *passim*

Leopold v. Baccarat, Inc.,
239 F.3d 243 (2d Cir. 2001) 8, 9

Matvia v. Bald Head Island Mgt., Inc.,
259 F.3d 261 (4th Cir. 2001) 6

Oncale v. Sundowner Offshore Serv., Inc.,
523 U.S. 75 (1998) 10, 11

Pennsylvania State Police v. Suders,
542 U.S. 129 (2004) 7

Pinkerton v. Colorado Dept. of Transportation,
563 F.3d 1052 (10th Cir. 2009) 3

Reed v. MBNA Marketing Systems, Inc.,
333 F.3d 27 (1st Cir. 2003), *reh'g denied*,
337 F.3d 1 (1st Cir. 2003) 7, 8

Robinson v. Sappington,
351 F.3d 317 (7th Cir. 2003) 7

Walton v. Johnson & Johnson Svcs., Inc.,
347 F.3d 1272 (11th Cir. 2003) 3, 8

Weger v. City of Ladue,
500 F.3d 710 (8th Cir. 2007) 5

REPLY FOR PETITIONER

The petition set forth a circuit split on an important and recurring question of law, namely, whether the affirmative defense to employer liability for sexual harassment that this Court fashioned in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), can be defeated based on subjective fears where there is no objective basis for the plaintiff's failure to report the harassment. Respondent does not dispute that other circuits have held that reporting is required absent objective evidence that it will be futile or provoke retaliation (and have done so to prevent the affirmative defense from being rendered a dead letter). Nor can respondent dispute that the decision below expressly acknowledged that it was in conflict with the Second Circuit's approach.

Respondent attempts to paper over the conflict by arguing that she had an objective basis for her failure to report, but the "factors" that respondent cites focus on Vargas (the human resources director, whom respondent alleged was complicit in Arce's harassment) and barely mention Executive Director Crespo. Petitioner's anti-harassment policy was reasonable precisely because it gave respondent the option to bypass Vargas and report directly to Crespo, whose integrity respondent did not question. That Vargas had allegedly retaliated against respondent for refusing Arce's advances was all the more reason for respondent to report the harassment—and the retaliation—to Crespo.

On the central question of why respondent was excused from reporting the harassment to Crespo,

respondent—like the court below—can point only to two "factors." Neither remotely rises to the level of objective evidence of futility or likely retaliation, and both underscore the direct conflict between the First Circuit and other courts of appeals. First, respondent relies on what she characterizes as the "friendship" among Arce, Vargas, and Crespo. On the undisputed evidence, Crespo's "friendship" was nothing more than run-of-the-mill office camaraderie. The Fourth, Sixth, and Eighth Circuits, in contrast, have expressly held that friendship among managers does not entitle a harassment victim to assume that reporting will be futile or will provoke retaliation. Second, respondent embraces the First Circuit's reliance on the "age differential" between respondent and Arce, but neither the First Circuit nor respondent explains why someone who has reached the age of majority is less able to report harassment by a 50-year-old as opposed to a 30-year-old. The Seventh Circuit, in contrast, has held (on a related issue under Title VII) that a sexual harassment victim's age is relevant only if she is a minor.

Finally, respondent argues that no conflict exists because whether a report is required depends on the totality of the circumstances. But that the legal standard is reasonableness does not mean that the standard has no legal content. Indeed, the imprecision of the "reasonableness" standard adopted in *Ellerth-Faragher* is all the more reason why this Court's guidance is needed now. As other circuits have recognized, subjective fears that reporting sexual harassment will be futile or provoke retaliation are likely to be the rule not the exception.

See, e.g., Walton v. Johnson & Johnson Svcs., Inc., 347 F.3d 1272, 1291 (11th Cir. 2003). This Court surely understood as much, but it nonetheless adopted the *Ellerth-Faragher* test as a generally-applicable affirmative defense. By allowing "subjective, ungrounded fears" of futility or retaliation to defeat the affirmative defense, the First Circuit has created an exception that swallows this Court's rule and "completely undermine[s]" the *Ellerth-Faragher* framework. *Pinkerton v. Colorado Dept. of Transportation*, 563 F.3d 1052, 1063 (10th Cir. 2009) (quotation omitted). This Court's review is needed to restore and clarify the careful balance that it struck in *Ellerth-Faragher*.

RESPONDENT CANNOT AVOID THE CLEAR CONFLICT CREATED BY THE DECISION BELOW OR THE NEED FOR THIS COURT'S REVIEW

1. Respondent criticizes the petition's discussion of the "friendship" between Executive Director Crespo and Arce and asserts that their friendship cannot be questioned given the jury's verdict. *See* Opp. 7 & n.4, 20 n.13. Construing the evidence in respondent's favor, however, cannot change the evidence itself. As the First Circuit noted, the only evidence of "friendship" between Crespo and Arce was respondent's testimony that she overheard conversations between Vargas and Arce and the fact that Crespo "may have gone out with Arce for drinks." *See* Pet. App. 13a. Petitioner does not dispute either the First Circuit's description of that evidence or its existence. The dispute, rather, is whether the type and degree of "friendship" shown

by that evidence, even when viewed in the light most favorable to respondent, is sufficient to allow respondent to assume that reporting Arce's harassment to Crespo would be futile or lead to retaliation. Even if a close, personal friendship with the harasser could justify a failure to report, neither item relied upon by the First Circuit remotely suggests a close relationship between Arce and Crespo, nor did the First Circuit suggest that its holding was based on a finding of such a close relationship. As to the "overheard conversations," respondent never testified about their contents. *See* A-976. As to the evidence that Arce and Crespo "may have gone out . . . for drinks," the First Circuit's use of this tentative and minimalist formulation is no accident—it was the sum total of the evidence.

Respondent cites six pages of the trial transcript for the assertion that "Arce, Vargas and [Crespo] were friends and would go out for drinks together." Opp. 4 (citing A-798-800, A-954-55, A-976). That citation merits close scrutiny and demonstrates the minimal nature of any "friendship." Pages 798 and 799 relate exclusively to Crespo and Vargas.[1] Pages 954 and 955 relate exclusively to Vargas and Arce; they contain respondent's testimony that Vargas and Arce were at a bar called La Terraza de Julio one evening, "together as usual," along with "some others of their co-workers." A-955. Page 976 relates to

---

[1] A-798 ("Q. And after he came to the Association, did you become friends with Mr. Vargas? A [Crespo]. We went on to become co-workers. Q. Do you ever go out for drinks? A. Maybe so. Could be.").

Crespo, but only because respondent there *denied* ever having seen Crespo with Vargas and Arce at La Terraza de Julio. Accordingly, the sole basis for the notion that Crespo was so close to Arce that respondent could bypass the *Ellerth-Faragher* reporting requirement was Crespo's testimony on page 800. That testimony suggested only the most run-of-the-mill collegial office relationship, and nothing approaching a close, personal friendship:

> Q. And do you have a friendship with Mr. Arce?
>
> A. We're also co-workers.
>
> Q. Have you ever gone out for drinks with Mr. Arce?
>
> A. Maybe so. I don't specifically recall that I have, but I might have done so.

If this degree of "friendship" between the alleged harasser and the individual designated to receive internal complaints—co-workers and the possibility of a shared beverage—entitles a would-be plaintiff to forgo reporting, then the affirmative defense is useless. For that very reason, the Fourth, Sixth, and Eighth Circuits have held, contrary to the decision below, that friendship among managers does not render reporting harassment unnecessary. Pet. 15-17 (discussing *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001), *Deters v. Rock-Tenn Co.*, 245 Fed. Appx. 516 (6th Cir. 2007), and *Weger v. City of Ladue*, 500 F.3d 710 (8th Cir. 2007)). The conflict is even sharper given that the First Circuit excused respondent's failure to report not merely based on a routine and insignificant degree of "friendship," but even where respondent

conceded that she had no reason to question Crespo's integrity. *See* A-978.

2. Respondent also tries to escape the conflict over whether objective evidence is required by deflecting attention to why a report to *Vargas* was not required. Respondent thus emphasizes that Vargas and Arce were friends and that Vargas retaliated against her after she refused Arce's advances. *See* Opp. 9, 12, 19, 25-26, 32-33. But that is irrelevant given the policy's option of reporting to Crespo, instead of Vargas. No one disputes the reasonableness of petitioner's anti-harassment policy and reporting procedure, a fact that makes this case an attractive vehicle for review. *See* Pet. 35. That policy was reasonable in part because it allowed victims to bypass the human resources director "[i]f the alleged harasser should be this person, or anyone related or close to him." A-156; Pet. 4. If Arce was "close" to Vargas, the policy instructed that "the complaint must be presented directly to the Association's Executive Director." *Id.* Accordingly, Vargas' alleged retaliation was a reason to report the harassment *and* the retaliation to Crespo, not an excuse for failing to do so.[2] *Cf. Matvia v. Bald Head Island Mgt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) (bringing a retaliation claim, "rather than failing to

---

[2] For these reasons, the only relevant thing about respondent's testimony that she was afraid that "they would take reprisals like they had done before" is that, whomever "they" may have referred to apart from Vargas, Crespo had never taken any "reprisals" and this testimony did not relate to him. *See* Pet. 7, 25 (citing A-1002-03).

report sexual harassment," is proper response to retaliation).[3]

3. Respondent's extensive reliance on the finding that she was constructively discharged is entirely beside the point. *See* Opp. 17-18, 30-32. This Court has squarely held that the *Ellerth-Faragher* framework applies to claims that sexual harassment caused a constructive discharge, where (as here) no tangible employment action is taken. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148-49 (2004). That harassment results in a constructive discharge therefore cannot mean that the victim's failure to report is reasonable.

4. The court below held that the "significant age differential" between respondent and Arce supported the reasonableness of her failure to report, apparently on the rationale that respondent was especially traumatized because of her "relative youth." Pet. App. 14a. The First Circuit had opened the door narrowly to this rationale in *Reed v. MBNA*

---

[3] Respondent's assertion that the facts of *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), are "almost identical to this case," Opp. 26, is fanciful. Robinson, a clerk being harassed by the judge for whom she worked, reported the harassment to her administrative supervisor and to the presiding judge, in contrast to respondent's failure to report the harassment to anyone. *See* 351 F.3d at 322-24, 337 n.13. And Robinson's employer had not disseminated an anti-harassment policy, and "[t]he record [did] not suggest that [she] was informed of any further avenues of recourse or complaint" beyond the two that she pursued, *id.* at 337 n.13, in contrast to petitioner's promulgation of a reasonable anti-harassment policy and respondent's awareness that she should report to Crespo.

Marketing Systems, Inc., 333 F.3d 27, 37 (1st Cir. 2003), where the plaintiff was a minor and the trauma was extreme (sexual assault). The decision below drove a truck through that narrow opening, extending *Reed* to an adult plaintiff who had not been subjected to sexual assault.[4] Neither respondent nor the First Circuit explains why an age differential, as opposed to not having reached the age of majority, justifies a failure to report. Moreover, this aspect of the decision conflicts with decisions of the Eleventh and Seventh Circuits. *See* Pet. 24-25 (discussing tension between decision below and *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006) (age), and *Walton*, 347 F.3d at 1290-91 & n.17 (trauma)).

5. Despite the First Circuit's express rejection of the Second Circuit's holding that a failure to report must be justified by evidence "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints," Pet. App. 18a (quoting *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001)), respondent contends that there is no conflict because

---

[4] Respondent accuses petitioner of "substitut[ing] its interpretation" of *Reed* for the interpretation given by the First Circuit sitting *en banc* in that case. Opp. 14-15 & n.9. First, the First Circuit did not convene *en banc* in *Reed*. The order quoted by respondent is the *panel's* explanation of its denial of panel rehearing; rehearing *en banc* was denied without explanation. *See* 337 F.3d 1, 1 (1st Cir. 2003). More fundamentally, as the petition explained (Pet. 21 n.8), regardless of how other courts previously had interpreted ambiguous passages in *Reed*, the First Circuit in the decision below has now clarified the law of that circuit.

Leopold did not mean what it said. *See* Opp. 21-22. According to respondent, reading *Leopold* literally would mean that an employee "who reasonably failed to report harassment *before the procedure had ever been tested*" would be "automatically deprived" of Title VII's protections. Opp. 22 (emphasis in original). But respondent's implicit criticism of *Leopold* does nothing to lessen the split between the First and Second Circuits. Indeed, the split is especially stark in that while the Second Circuit requires demonstrated prior futility or retaliation, the First Circuit appears to treat reporting harassment as optional in the absence of demonstrated prior success.[5]

Respondent next contends (Opp. 25-27 & n.18) that *Leopold* and other cases are distinguishable because they did not involve "actual retaliation" while this case does. This supposed distinction fails because—as already explained, *see supra* at 6—all of respondent's evidence relating to retaliation is exclusive to *Vargas* and does not address her failure

---

[5] Respondent criticizes petitioner for asserting that the First Circuit upheld the exclusion of "evidence of past responsiveness" in referring to that court's holding with respect to the policy's conceded effectiveness when it was invoked in 2005. Opp. 22 n.14 (quoting Pet. 11). To be sure, the 2005 complaint occurred after respondent's resignation, albeit before trial. As the petition explained, however, the important point is that the First Circuit not only held that evidence of past futility or retaliation was not required, *contra Leopold*, but went so far as to hold that the only evidence offered at trial bearing on the policy's actual effectiveness was irrelevant. *See* Pet. 10 n.4.

to report to *Crespo*, whom she does not allege to have engaged in any actual or threatened retaliation.[6]

6. Finally, respondent argues against certiorari on the ground that the reasonableness of a failure to report depends on the "totality of the circumstances." Opp. 11, 13 n.8, 18 n.12, 19, 28. But respondent's repetition of this phrase cannot make the divergent legal approaches of the circuits disappear or transform the evidence in this case into the objective evidence demanded by other circuits. That the applicable standard is one of "reasonableness" does not mean the standard has no legal content or that a split cannot emerge, as this Court's routine review of Fourth Amendment issues amply demonstrates.

Certainly *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998), despite its prominence in the brief in opposition, does not suggest that the *Ellerth-Faragher* inquiry is hopelessly factbound. Indeed, as one might expect from an opinion authored by Justice Scalia, *Oncale* is not a paean to the superiority of the totality-of-the-circumstances

---

[6] Respondent's accusation that the petition misstated the evidence relating to Vargas (and his alleged mistress Del Valle) is beside the point for the same reason. Respondent's accusation also is incorrect. Respondent attacks the "statement in the Petition that the 'only witness besides respondent to an incident of possible harassment was a fellow employee named Jose Francisco Figueroa-Cana.'" Opp. 31-32 n.22 (purporting to quote Pet. 5). The quoted statement, however, does not appear in the petition. Rather, petitioner stated: "The only witness besides respondent *to testify* to an incident of possible harassment was a fellow employee named [Figueroa]." Pet. 5 (emphasis added). Petitioner's statement was correct. *See also* Pet. 4 n.1.

test, and predating *Ellerth* and *Faragher* and addressing the distinct question of how to judge the "objective severity of harassment," *see* 523 U.S. at 81, *Oncale* hardly could hold the key to how the Court should refine the affirmative defense that it fashioned in *Ellerth* and *Faragher*. Moreover, in giving content to the reasonableness of a plaintiff's failure to report under *Ellerth-Faragher*, it surely cannot be reasonable to adopt a standard that excuses reporting so often that the entire careful balance struck by the Court is undermined. Employers will not have incentives to create internal reporting systems and those systems will not stop harassment before it escalates, if there is no incentive to report and no reward for employers who adopt reasonable systems.

Respondent concludes that she was justified in not reporting the harassment because "[i]t was reasonably foreseeable for Crespo to protect Arce and Vargas." Opp. 33. The question on which this Court's guidance is needed is whether it is reasonable for an employee simply to assume that managers are likely to stick together and that reporting harassment will be useless or worse, *see* A-976, A-1003, or whether there must be an objective foundation for such a belief. Such an objective foundation could take multiple forms, and this Court of course could leave it to the lower courts to apply an objective-evidence requirement in the myriad factual scenarios that may arise. But if there is no requirement for an objective basis to excuse a failure to report, then reporting will be the exception rather than the rule and this Court's carefully-crafted scheme will be vitiated. *Cf. Crawford v. Metro. Gov't*

of Nashville and Davidson County, 129 S.Ct. 846, 852 (2009) (rejecting an interpretation that would "largely undermine the *Ellerth-Faragher* scheme" and Title VII's primary purpose of avoiding harm by encouraging employees to "keep quiet"). Every *Ellerth-Faragher* case will have some degree of factual content, and this case presents the issue in a uniquely clean manner: petitioner's satisfaction of the first prong, respondent's failure to report the harassment to anyone, and the lack of any objective evidence that reporting to Crespo would be futile or provoke retaliation are all undisputed. *See* Pet. 35-36.

CONCLUSION

The petition should be granted.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY S. BUCHOLTZ
SARAH O. JORGENSEN
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202-737-0500

PEDRO E. ORTIZ-ALVAREZ
JORGE MARTINEZ-LUCIANO
LAW OFFICES OF PEDRO
ORTIZ-ALVAREZ, PSC
P.O. BOX 9009
PONCE, PR 00732

August 5, 2009

Attorneys for Petitioner